No. 06-1181
Title: Samson Taiwo Dada, Petitioner
v.
Michael B. Mukasey, Attorney General
Docketed: March 1, 2007
Lower Ct: United States Court of Appeals for the Fifth Circuit
Case Nos.: (06-60180)
Decision Date: November 28, 2006
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Feb 26 2007	Petition for a writ of certiorari filed. (Response due April 2, 2007)
Mar 30 2007	Order extending time to file response to petition to and including May 2, 2007.
Apr 26 2007	Order further extending time to file response to petition to and including June 1, 2007.
Jun 1 2007	Brief of respondent Alberto R. Gonzales, Attorney General in opposition filed.
Jun 13 2007	DISTRIBUTED for Conference of September 24, 2007.
Aug 17 2007	Reply of petitioner Samson Taiwo Dada filed. (Distributed)
Sep 25 2007	Petition GRANTED limited to the following Question: "Whether the filing of a motion to reopen removal proceedings automatically tolls the period within which an alien must depart the United States under an order granting voluntary departure." The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, November 5, 2007. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, December 3, 2007. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Friday, December 28, 2007. Briefs of amici curiae are to be filed with the Clerk and served upon counsel for the parties on or before 2 p.m., 7 days after the brief for the party supported is filed, or if in support of neither party, within 7 days after the petitioner's brief is filed.
Oct 12 2007	Record received from U.S.C.A. for the 5th Circuit. (1 envelope)
Oct 19 2007	Motion to dispense with printing the joint appendix filed by petitioner Samson Taiwo Dada.
Nov 5 2007	Brief of petitioner Samson Taiwo Dada filed.
Nov 9 2007	Brief amicus curiae of American Immigration Law Foundation, et al. filed.
Nov 13 2007	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Nov 13 2007	Brief amicus curiae of Adil Chedad filed.
Nov 16 2007	SET FOR ARGUMENT ON Monday, January 7, 2008.
Dec 3 2007	Brief of respondent Michael B. Mukasey, Attorney General filed.
Dec 12 2007	CIRCULATED.
Dec 21 2007	Reply of petitioner Samson Taiwo Dada filed. (Distributed)
Jan 8 2008	Argued. For petitioner: Cristopher J. Meade, New York, N.Y. For respondent: Edwin S. Kneedler, Deputy Solicitor General, Department of Justice, Washington, D.C.
Jan 14 2008	The parties are directed to file supplemental briefs addressing the following question: "Whether an alien who has been granted voluntary departure and has filed a timely motion to reopen should be permitted to withdraw the request for voluntary departure prior to the expiration of the departure period." The briefs, not to exceed 3,000 words, are to be filed simultaneously with the Clerk and served upon opposing counsel on or before

	2 p.m., Friday, January 25, 2008. Reply briefs, not to exceed 2,000 words, may be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Friday, February 1, 2008.
Jan 25 2008	Supplemental brief After Oral Argument of respondent Michael B. Mukasey, Attorney General filed. (Distributed)
Jan 25 2008	Supplemental brief After Oral Argument of petitioner Samson Taiwo Dada filed. (Distributed)
Jan 25 2008	Letter from counsel for petitioner proposing to lodge copies of unpublished agency decisions and filings in Matter of Davis (A76-832-166) filed.
Jan 29 2008	Petitioner's lodging proposal approved by Clerk of Court.
Jan 30 2008	Lodging consisting of twenty copies of material received from counsel for petitioner. (Distributed).
Feb 1 2008	Supplemental reply brief After Oral Argument of respondent filed. (Distributed)
Feb 1 2008	Supplemental reply brief After Oral Argument of petitioner filed. (Distributed)

(1)
SUPREME COURT, U.S.
FILED
No. 06-1181 FEB 26 2006
OFFICE OF THE CLERK

In The

Supreme Court of the United States

SAMSON TAIWO DADA,

Petitioner,

v.

ALBERTO GONZALES,
United States Attorney General,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Petitioner was rendered statutorily ineligible for adjustment of status to lawful permanent resident because he did not depart the United States voluntarily pursuant an order of the Board of Immigration Appeals ("BIA"), despite the fact that Petitioner had timely withdrawn his request for voluntary departure.

2. Alternatively, whether the period of voluntary departure granted by the BIA was tolled by the timely filing of Petitioner's Motion to Reopen and Reconsider his removal to seek relief in the form of adjustment of status.

PARTIES TO THE PROCEEDING

All parties to the proceeding are named in the caption of the case as recited on the cover page. There are no nongovernmental corporate parties requiring a disclosure statement under Supreme Court Rule 29.6.

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CITATIONS TO THE OPINIONS AND ORDERS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit dismissing Petitioner's petition for review is unreported. *Dada v. Gonzales,* No. 06-60180 (5th Cir. November 28, 2006). App. 1.

The decision of the Board of Immigration Appeals denying respondent's Motion to Reopen and Reconsider affirming the Immigration Judge denying Petitioner's application for adjustment of status to lawful permanent resident pursuant to §245 of the Immigration and Nationality Act ("INA"), 8 U.S.C. §1255, is unreported. *Matter of Dada,* File A78 129 270 (BIA, February 8, 2006). App. 3.

The decision of the Board of Immigration Appeals affirming without opinion the decision of the Immigration Judge is unreported. *Matter of Dada,* File A78 129 270 (BIA, November 4, 2005). App. 5.

The decision of the Immigration Judge, denying Petitioner an opportunity to apply for adjustment of status is unreported. *Matter of Dada,* File A78 129 270 United States Immigration Court, Houston, Texas, September 8, 2004). App. 6.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifth Circuit denied Petitioner's petition for review on November 28, 2006. Jurisdiction in this Court is therefore proper by writ of certiorari pursuant to 28 U.S.C. §1254(1). While Petitioner's case involves an application for relief from removal, review is not barred by 8 U.S.C. §1252(a)(2)(B)

because the questions presented herein are "questions of law raised upon a petition for review." 8 U.S.C. §1252(a)(2)(D).

APPLICABLE LAW

INA §245(a), 8 U.S.C. §1255(a), which provides:

> Status as person admitted for permanent residence on application and eligibility for immigrant visa. The status of an alien who was inspected and admitted or paroled into the United States or the status of any other alien having an approved petition for classification as a VAWA self-petitioner may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed.

INA §240(c)(7)(A), 8 U.S.C. §1229a(c)(7)(A), which provides: "In general. An alien may file one motion to reopen proceedings under this section, except that this limitation shall not apply so as to prevent the filing of one motion to reopen described in subparagraph (C)(iv)."

INA §240(c)(7)(C)(i), 8 U.S.C. §1229a(c)(7)(C)(i), which provides: "In general. Except as provided in this subparagraph, the motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal."

INA §240B(b)(1), 8 U.S.C. §1229c(b)(1), which provides:

> In general. The Attorney General may permit an alien voluntarily to depart the United States at the alien's own expense if, at the conclusion of a proceeding under section 240 [8 U.S.C. §1229a], the immigration judge enters an order granting voluntary departure in lieu of removal and finds that – (A) the alien has been physically present in the United States for a period of at least one year immediately preceding the date the notice to appear was served under section 239(a) [8 U.S.C. §1229(a)]; (B) the alien is, and has been, a person of good moral character for at least 5 years immediately preceding the alien's application for voluntary departure; (C) the alien is not deportable under section 237(a)(2)(A)(iii) or section 237(a)(4) [8 U.S.C. §1227(a)(2)(A)(iii) or §1227(a)(4)]; and (D) the alien has established by clear and convincing evidence that the alien has the means to depart the United States and intends to do so.

INA §240B(b)(2), 8 U.S.C. §1229c(b)(2), which provides: "Period. Permission to depart voluntarily under this subsection shall not be valid for a period exceeding 60 days."

INA §240B(d)(1), 8 U.S.C. §1229c(d)(1), which provides:

> In general. Subject to paragraph (2), if an alien is permitted to depart voluntarily under this section and voluntarily fails to depart the United States within the time period specified, the alien – (A) shall be subject to a civil penalty of not less than $ 1,000 and not more than $ 5,000; and (B) shall be ineligible, for a period of 10 years, to receive any further relief under this section and sections 240A, 245, 248, and 249.

8 C.F.R. §1245.2(a)(1)(i), which provides: "In General. In the case of any alien who has been placed in deportation proceedings or in removal proceedings (other than as an arriving alien), the immigration judge hearing the proceeding has exclusive jurisdiction to adjudicate any application for adjustment of status the alien may file."

8 C.F.R. §1003.2(c)(1), which provides:

> A motion to reopen proceedings shall state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits or other evidentiary material. A motion to reopen proceedings for the purpose of submitting an application for relief must be accompanied by the appropriate application for relief and all supporting documentation. A motion to reopen proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears that the alien's right to apply for such relief was fully explained to him or her and an opportunity to apply therefore was afforded at the former hearing, unless the relief is sought on the basis of circumstances that have arisen subsequent to the hearing. Subject to the other requirements and restrictions of this section, and notwithstanding the provisions in §1001.1(p) of this chapter, a motion to reopen proceedings for consideration or further consideration of an application for relief under section 212(c) of the Act (8 U.S.C. 1182(c)) may be granted if the alien demonstrates that he or she was statutorily eligible for such relief prior to the

entry of the administratively final order of deportation.

8 C.F.R. §1003.2(c)(2), which provides:

Except as provided in paragraph (c)(3) of this section, a party may file only one motion to reopen deportation or exclusion proceedings (whether before the Board or the Immigration Judge) and that motion must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened, or on or before September 30, 1996, whichever is later. Except as provided in paragraph (c)(3) of this section, an alien may file only one motion to reopen removal proceedings (whether before the Board or the Immigration Judge) and that motion must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened.

8 C.F.R. §1003.2(d), which provides:

Departure, deportation, or removal. A motion to reopen or a motion to reconsider shall not be made by or on behalf of a person who is the subject of exclusion, deportation, or removal proceedings subsequent to his or her departure from the United States. Any departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider, shall constitute a withdrawal of such motion.

8 C.F.R. §1240.26(f), which provides:

Extension of time to depart. Authority to extend the time within which to depart voluntarily specified initially by an immigration judge or the Board

is only within the jurisdiction of the district director, the Deputy Executive Associate Commissioner for Detention and Removal, or the Director of the Office of Juvenile Affairs. An immigration judge or the Board may reinstate voluntary departure in a removal proceeding that has been reopened for a purpose other than solely making an application for voluntarily departure if reopening was granted prior to the expiration of the original period of voluntary departure. In no event can the total period of time, including any extension, exceed 120 days or 60 days as set forth in section 240B of the Act.

STATEMENT OF THE CASE

This case involves the contradictory interplay between two sections of the Immigration and Nationality Act ("INA"), one permitting a motion to reopen and/or reconsider a decision in removal proceedings to seek relief from removal if filed within ninety days of a final removal order, and another section of the Act that bars certain relief applications for ten years when the alien fails to timely depart the United States after having been granted the privilege of voluntary departure. Specifically, the issue is whether the timely filing of a motion to reopen (when voluntary departure was granted in the underlying proceeding) *tolls* the voluntary departure order while the motion is being considered, or, as will be discussed herein, the alien loses all rights to underlying relief by not voluntarily departing if the appeal adjudicatory period lasts longer than the period of voluntary departure.

Petitioner Samson T. Dada appealed a decision from the Immigration Judge denying him an opportunity to apply for adjustment of status under Section 245 of the

INA, 8 U.S.C. §1255 pursuant to *Matter of Velarde*, 23 I&N Dec. 253 (BIA 2002).[1] The BIA dismissed his appeal through an affirmance without opinion and reinstated the voluntary departure order of the Immigration Judge. Prior to the expiration of his voluntary departure period, Petitioner filed a Motion to Reopen and Reconsider with the Board under *Matter of Velarde*, and timely withdrew his request for voluntary departure. This Motion was denied for failure to voluntarily depart, thereby making Petitioner ineligible for adjustment of status. The Court of Appeals held that the Petitioner failed to show that the BIA abused its discretion in denying the Motion to Reopen and Reconsider, and, accordingly, denied the Petition for Review.

The majority of United States Courts of Appeals that have considered the issue have held that the timely filing of a motion to reopen before the expiration of a voluntary departure period tolls the voluntary departure while the motion is under consideration, such that the relief application underlying the motion to reopen remains viable. The Fifth Circuit's decision in Petitioner's case therefore creates a split between the Circuits with respect to the questions presented, with the Fifth Circuit standing alone in its interpretation of the applicable statutes and regulations. It should also be noted that a petition for a writ of certiorari dealing with substantially similar issues is currently pending before this Honorable Court. *See Jamal Moorani v. Alberto R. Gonzalez*, No. 06-610 (2006).

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[1] The Immigration Judge's decision denying respondent an opportunity to apply for adjustment of status is most troubling. Contrary to established precedent, the Immigration Judge denied Petitioner an opportunity to apply for adjustment of status under Section 245(a) of the Act because of the length of time in processing the visa petitions, which is entirely beyond the control of the petitioner.

A. Jurisdiction of the Court of Appeals

The Court of Appeals had jurisdiction over Petitioner's petition for review pursuant to INA §242(a)(1), 8 U.S.C. §1252(a)(1), which provides for judicial review of a final order of removal.

B. Facts

The Petitioner, Mr. Samson T. Dada, is a native and citizen of Nigeria who first entered the United States on or about April 10, 1998 as a non-immigrant with a P-3 classification[2] with an authorized period of stay in the U.S. until August 31, 1998. Subsequent to his admission, Petitioner married a United States citizen. It should be noted that the Petitioner has attempted to comply with the immigration laws in every way. He is not a criminal nor has he committed fraud. He is married to a U.S. citizen, and is the beneficiary of an immediate relative visa petition. None of these important underlying facts are disputed in these proceedings.

Petitioner's wife filed an immediate relative visa petition on his behalf to allow him to become a legal permanent resident of the United States. Concurrently with this visa petition, Petitioner filed an application for adjustment of status under Section 245(a) of the INA. Specifically, Section 245(a) of the Act provides for the adjustment of status of an alien who was inspected, admitted, or paroled into the United States, regardless of overstay, if the alien:

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[2] A P-3 visa classification is accorded to artists or entertainers coming to the U.S. to perform.

1. . . . [m]akes an application for such adjustment;

2. the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence; and

3. an immigrant visa is immediately available to him at the time his application is filed. INA Section 245(a); 8 U.S.C. §1255(a).

Petitioner satisfies all of these requirements. Nevertheless, he failed to respond to a request for additional evidence from the Government and his visa petition was denied.

On January 4, 2004 the Government issued a Notice to Appear ("NTA") charging the Petitioner with being removable. In the interim, Petitioner's wife filed a new visa petition on his behalf. At the underlying removal hearings, Petitioner sought relief in the form of adjustment of status in court as the beneficiary of the newly filed immediate relative petition filed by his U.S. citizen wife. *See* App. 7. As the visa petition remained pending at the time he was placed in proceedings, Petitioner sought a continuance to allow for the visa petition to be approved. *Id.* However, contrary to established precedent, the Immigration Judge denied Petitioner a continuance while awaiting the adjudication of his visa petition simply because "it would take too long." *Id.*

Inexplicably, the Board of Immigration Appeals affirmed the decision without opinion. *See* App. 5. After a Motion to Reopen and Reconsider and withdrawal of request for voluntary departure was filed, the Board found that at that point the Petitioner was ineligible to adjust because he did not depart the United States per the

voluntary departure grant, did not allow respondent to withdraw his voluntary departure, and asserted that Petitioner was barred for adjustment of status for ten years under *Matter of Shaar*, 21 I&N Dec. 3290 (BIA 1996). *See* App. 3. Petitioner's attempt to reopen his removal proceedings to enable consideration of his adjustment of status forms the basis of the controversy herein, as the primary issue in dispute is whether the grant of voluntary departure while such a reopening was pending should have been tolled.

C. Procedural History

The instant removal proceedings were commenced by the filing of a Notice to Appear, dated January 4, 2004. The NTA was issued by the INS Interim District Director, following Petitioner's denial of his initial immediate relative visa petition and adjustment of status applications. The allegations and charge of removability under the NTA are not at issue or the subject of the instant petition.

(1) Before the Immigration Judge

At a master calendar hearing, the Petitioner pleaded to the allegations and charge on the NTA through counsel. On the subject of relief, Mr. Dada indicated through counsel that he would be seeking adjustment of status under Section 245(a) of the Act. Mr. Dada's immediate relative visa petition remained pending at the time of the hearing. Accordingly, he requested a continuance to allow for the adjudication of the visa petition, as permitted under *Matter of Velarde*, 23 I&N Dec. 253 (BIA 2002). Deviating from established precedents, the Immigration

Judge denied a continuance simply because she believed the adjudication of the visa petition would be too lengthy. App. 7.

(2) Administrative Appeal

Petitioner appealed to the BIA complaining initially about the denial of a continuance under *Matter of Velarde*, *supra*, to allow him to pursue adjustment of status. The Board of Immigration Appeals dismissed his appeal and reinstated a period of voluntary departure. App. 5. Prior to the expiration of his voluntary departure period, the Petitioner filed a Motion to Reopen and Reconsider the dismissal on his case arguing eligibility under *Velarde, supra*. App. 3. In that Motion, Petitioner also timely withdrew his request for voluntary departure. Further, with his motion, Petitioner filed proof of his eligibility to adjust his status under *Matter of Velarde*, *supra*. Without articulating their rationale for deviating from their own precedent, the Board of Immigration Appeals denied Petitioner's Motion to Reopen and Reconsider, and found that since the Petitioner failed to depart pursuant to the voluntary departure as it had been originally reinstated by the Board of Immigration Appeals, he was barred from adjustment of status for ten years. App. 3. A timely petition for review with the Fifth Circuit Court of Appeals followed. App. 1.

(3) Judicial Review

Before the Fifth Circuit Court of Appeals, Petitioner urged that the BIA erred in not reopening his case to allow him to pursue adjustment of status. Petitioner properly raised the argument that the timely filing of his motion to

reopen before the expiration of the thirty-day voluntary departure period operated to toll the voluntary departure while the motion was under consideration. In support of this argument, Petitioner cited decisions from both the Ninth and Eighth Circuit Courts of Appeals. *See Azarte v. Ashcroft,* 394 F.3d 1278 (9th Cir. 2005); *Sidikhouya v. Gonzales,* 407 F.3d 950 (8th Cir. 2005). Subsequent to the briefing of this appeal, the Third Circuit Court of Appeals also ruled that the voluntary departure period was tolled by a timely motion to reopen in its decision in *Kanivets v. Gonzales,* 424 F.3d 330 (3rd Cir. 2005).

The Fifth Circuit ruled that the timely filing of the Motion to Reopen and Reconsider did not toll the expiration of the voluntary departure order, and that the alien's failure to depart therefore rendered him ineligible for the requested relief for ten years. *See* App. 1-2. It should be noted that strong dissenting opinion was filed in *Banda-Ortiz v. Gonzales,* 445 F.3d 387 (5th Cir. 2006), the case cited by the Fifth Circuit in denying the underlying petition for review. The dissent in *Banda-Ortiz* reasoned that the Fifth Circuit should have followed the decisions and rationale of the Ninth, Eighth and Third Circuits. *See Banda-Ortiz v. Gonzales,* 445 F.3d 387, 391 (5th Cir. 2006). In ultimately denying Mr. Dada's petition for review, the Fifth Circuit failed to address the effect of Mr. Dada's timely withdrawal of his request for voluntary departure. *See* App. 1-2.

Subsequent to the decision by the Fifth Circuit Court of Appeals in this case, the Eleventh Circuit joined the Ninth, Eighth and Third Circuits' holdings regarding voluntary departure "tolling" issue. *Ugokwe v. U.S. Attorney General,* 453 F.3d 1325 (11th Cir. 2006). In so doing, the Eleventh Circuit discussed and specifically rejected

the Fifth Circuit position announced by the *Banda-Ortiz* majority. *Id.* at 1330.

In light of the four-to-one Circuit split, as well as the extremely strong dissenting opinion in the one outlying decision (*Banda-Ortiz*) and the fact that the facts of Petitioner's case were not addressed in that decision, Petitioner timely files the instant petition for writ of certiorari.

ARGUMENT FOR ALLOWING THE WRIT

The decision of the Court of Appeals in this case is ill-considered and contrary to the holdings of all other Circuits that have considered these issues. This Court's intervention is therefore necessary to insure uniformity in the application of the law.

The procedural circumstances of this case are not unusual. An alien seeks relief from removal, in this case by an application for adjustment of status before the court. Under *Matter of Velarde, supra*, an alien is entitled to a continuance while his immediate relative visa petition remains pending. The statute and regulations allow the Attorney General to reopen proceedings to seek newly available relief, setting forth time limits and other procedural requirements that were met in this case. 8 C.F.R. §1003.2.

However, the process of reopening becomes infinitely more complicated, if not impossible, if the alien is granted voluntary departure under INA §240B. 8 U.S.C. §1229c. Once a motion to reopen is filed, *any* departure from the United States by the alien operates to withdraw the

motion. 8 C.F.R. §1003.2(d). Voluntary departure is limited to no more than sixty days at the conclusion of removal proceedings. 8 U.S.C. §1229c(b)(2). In dismissing an appeal, the BIA routinely extends that voluntary departure for an additional thirty days.[3] *Matter of Chouliaris,* 16 I&N Dec. 169 (BIA 1977). Motions to reopen, however, routinely take much longer than the period of voluntary departure to be decided. An alien granted voluntary departure is thus confronted with the dilemma when relief becomes available of either filing a motion to reopen and awaiting a decision or departing the U.S. (in compliance with the voluntary departure order) and, in so doing, abandoning any relief.

The decision below restricts not only the rights of aliens who seek to reopen removal proceedings for available or newly available relief, but the power and discretion of the Attorney General to consider and grant such motions. By holding that the Attorney General loses jurisdiction to reopen removal proceedings upon the expiration of a brief period of voluntary departure, the Fifth Circuit's position effectively erases both the statute and regulation that allow reopening of removal proceedings for consideration of new relief. Further, because this extreme consequence befalls only aliens granted the "privilege" of voluntary departure, wary aliens and their counsel will no

[3] The BIA's practice of automatically extending voluntary departure for a period of thirty days following an unsuccessful appeal by the alien has existed for almost thirty years and continues to this day. Whether such practice is still proper in light of the sixty-day limit imposed by statute and regulation remains an open question. Moreover, the Petitioner timely withdrew his request for voluntary departure. His request was denied by the BIA, and was not considered at all in the decision from the Fifth Circuit.

longer dare to apply for voluntary departure, and an important tool provided in the Immigration and Nationality Act for efficient administration of the immigration laws will become useless. The Fifth Circuit's decision in this case thus has implications and consequences far beyond the individual suffering of Mr. Dada.

There are three reasons the decision below should be vacated. First, as urged to the Immigration Judge, the BIA and the Court of Appeals, the Immigration Judge's decision denying Petitioner an opportunity to apply for adjustment of status under Section 245(a) of the Act was contrary to established precedent and thus violative of Petitioner's due process rights. Second, the timely withdrawal of his request for voluntary departure eliminated the order of voluntary departure such that Mr. Dada no longer had a period in which to depart. Alternatively, if that voluntary departure period somehow survived the withdrawal, such a period should have been tolled by the timely filing of the motion to reopen and reconsider. Finally, the decision should be vacated because, in holding that the BIA lacked jurisdiction to reopen after the expiration of the voluntary departure period, the Court of Appeals affirmed the denial of relief to Mr. Dada on grounds never articulated by the Immigration Judge or the BIA.

A. The Voluntary Departure issue upon reopening

Petitioner raised the argument to both the Board and the Fifth Circuit that the voluntary departure order with which he allegedly failed to comply no longer existed after the Petitioner withdrew his request for voluntary departure. This issue of whether failure to comply with a voluntary departure order bars relief, even when a motion to

reopen was filed during the voluntary departure period and remained pending afterwards, was specifically addressed in an on-point Seventh Circuit decision, *Orichitch v. Gonzales,* 421 F.3d 595 (7th Cir. 2005).

In *Orichitch*, the Seventh Circuit Court of Appeals *expressly* held that the bar to relief provided in INA §240B(d) – the statute expressly relied upon in the denial or Mr. Dada's application – no longer applies if the voluntary departure order has been reopened.

> There is no dispute that Orichitch did not depart within the specified period for her voluntary departure, or that she was warned in the order of the consequences for failing to do so. What remains at issue is whether *Section 240B(d)* continues to operate in this case.
>
> It does not. The BIA, by granting Orichitch's motion to reopen on February 12, 2001, permanently disposed of the existing *Section 240B(d)* issue. More precisely, the grant of the motion to reopen disposed of the *Section 240B(d)* issue by disposing of the order that otherwise triggered the operative effect of that section – the February 10, 1999, voluntary departure order.

Orichitch, 421 F.3d at 597-98. As will be discussed further herein, the holding of the Fifth Circuit is in direct contravention with the authority of multiple other Circuits.

Furthermore, there is no authority of which Petitioner is aware that supports the BIA position in this case that INA §240B(d) deprives the Board of "jurisdiction" over considering the merits of a timely filed motion. 8 U.S.C. §1229c(d). The cited statute says nothing about limiting the Attorney General's authority to reopen removal proceedings. Moreover, Congress specified elsewhere in the

Act that aliens shall have the opportunity to file a motion to reopen within ninety days of the final removal order. INA §240(c)(7)(A), (C)(i); 8 U.S.C. §1229a(c)(7)(A), (C)(i). By holding that a failure to depart after the filing of a timely motion deprives the Board of jurisdiction over the motion, the decision below (and in *Banda-Ortiz* to the extent it implies such a holding) effectively overrides the ninety-day *statutory* time limit for filing a motion to reopen. INA §240(c)(7)(C), 8 U.S.C. §1229a(c)(7)(C).

Thus, by the rationale of the Fifth Circuit in *Banda-Ortiz* and the underlying case, a motion to reopen would have to be filed *and decided* within the thirty-day voluntary departure period generally granted by the Board. It implies that the Attorney General does not even have the *discretion* to reopen once the thirty-day voluntary departure period expires, despite the filing of a timely and meritorious motion. Rather, *Banda-Ortiz* essentially commands that the Board make its decision before the voluntary departure period expires – sometimes a matter of mere days after the motion is filed – in every case, or lose the ability to order the case reopened.

It also cannot be overemphasized that all of these consequences *only* apply to aliens granted the so-called *privilege* of voluntary departure. An alien ordered deported or removed in the first instance would be unaffected by these constraints. If *Banda-Ortiz* and the decision in this case are left to endure, then no alien with the slightest possibility of future relief should *ever* agree to voluntary departure, and an important "tool" provided by Congress to allow Immigration Judges "to quickly and efficiently dispose of numerous cases on their docket" thereby loses much of its intended effect. *Matter of Arguelles,* 22 I&N Dec. 811 (BIA 1999).

B. The "Tolling Issue"

As noted above, the procedural setting of this case is not unique. Aliens with relief or newly available relief from removal frequently file timely motions to reopen in accordance with the statute and regulations permitting them so to do. 8 U.S.C. §1229a(c)(7), 8 C.F.R. §1003.2. The Courts of Appeals have therefore been confronted with the interplay of that statute and another raising a ten-year bar to relief for failure to depart during a voluntary departure period. 8 U.S.C. §1229c(d). Of course, in most of those cases, the failure to depart was asserted by the BIA as grounds for *denying* the motions to reopen rather than considering the merits of the individual cases. The approach adopted by multiple other Circuits of considering the voluntary departure period tolled after the filing of a timely motion to reopen presents an alternative reason for rejecting the decision below.

1. The Circuit Split

The Ninth Circuit Court of Appeals was the first to confront this dilemma. In *Azarte v. Ashcroft,* 394 F.3d 1278 (9th Cir. 2005), the Ninth Circuit held that the voluntary departure period is tolled with the filing of a motion to reopen. *Azarte v. Ashcroft,* 394 F.3d 1278 (9th Cir. 2005). The rationale for this holding was the need to construe the statute as a whole – "the statutory interpretation of the motion to reopen and voluntary departure provisions must be such that both provisions have force." *Id.* at 1288.

The Ninth Circuit noted that aliens have a statutory right to file a motion to reopen within the limits provided, that any departure would operate to withdraw the motion to reopen, that voluntary departure could not be extended beyond the maximum sixty days authorized by statute, and

that "the BIA rarely if ever rules on a motion to reopen before an alien's voluntary departure period has expired." *Id.* at 1281-82. By interpreting the ten year bar for failure to depart as barring relief even where a motion to reopen is timely filed, the BIA "deprives the motion to reopen provision of meaning by eliminating the availability of such motions to those granted voluntary departure." *Id.* at 1288. The Ninth Circuit, therefore, found it more consistent with the Immigration and Nationality Act as a whole to "toll the voluntary departure period when an alien, prior to the expiration of his voluntary departure period, files a timely motion to reopen." *Id.*

Other Circuits soon followed the Ninth. Four months after *Azarte*, the Eighth Circuit adopted the same rationale and holding in *Sidikhouya v. Gonzales,* 407 F.3d 950 (8th Cir. 2005). Later that same year, the Third Circuit also held that a motion to reopen filed before the expiration of the voluntary departure period must be adjudicated on its merits. *See Kanivets v. Gonzales,* 424 F.3d 330 (3rd Cir. 2005).

The facts in *Kanivets* are quite similar to those presented in the instant case. Specifically, an application was denied with a grant of sixty-days voluntary departure, the denial was affirmed by the BIA, and the voluntary departure was extended for an additional thirty days. *Id.* However, before the end of that period, a motion to reopen was filed seeking adjustment of status based upon an immigrant visa petition filed by a prospective employer. *Id.* In *Kanivets,* however, the Board denied reopening, asserting that the expiration of the voluntary departure period subsequent to the filing of the motion to reopen rendered the alien ineligible for adjustment of status under INA §240B(d). 8 U.S.C. §1229c(d). The Third Circuit, however,

held that such a motion filed before the expiration of the voluntary departure period must be adjudicated on the merits. *See Kanivets v. Gonzales,* 424 F.3d 330 (3rd Cir. 2005).

The Eleventh Circuit also has recently ruled that a timely motion to reopen, filed before the expiration of voluntary departure, operates to toll the voluntary departure period until the motion can be decided on its merits. *Ugokwe v. U.S. Attorney General,* 453 F.3d 1325 (11th Cir. 2006). After an analysis of the earlier precedential decisions from the Ninth, Eighth and Third Circuits, as well as the Fifth Circuit decision and the dissenting opinion in *Banda-Ortiz,* the Eleventh Circuit held:

> We are persuaded by the rationale of Judge Smith and the Third, Eighth, and Ninth Circuits. Because Ugokwe's case clearly involves both the voluntary departure and motion to reopen statutes, we cannot, as did the Fifth Circuit, exclusively focus on the voluntary departure standards and ignore the motion to reopen provisions.

Ugokwe v. U.S. Attorney General, 453 F.3d at 1330. Thus, had Mr. Dada's case arisen in any of the numerous states governed by the Third, Eighth, Ninth or Eleventh Circuits, the sole issue asserted for denying his application for lawful permanent resident status would never have barred relief or reopening. As Petitioner believes those Circuits to have correctly interpreted the interplay between the motion to reopen and the voluntary departure provisions of the Immigration and Nationality Act, intervention from this Court is urgently sought to resolve the Circuit split.

2. The Effect of the Fifth Circuit Position

The practical effect of the competing positions should be briefly discussed at this point. The majority position taken by the Third, Eighth, Ninth and Eleventh Circuits is both logical and reasonable to all parties involved. The position does not require the Attorney General to reopen all cases where newly available relief or new evidence is asserted. The Attorney General, through his Immigration Judges and the Board of Immigration Appeals, may still deny reopening on any number of procedural or substantive grounds, as well as in the exercise of discretion. By tolling the expiration of the voluntary departure period after the filing of a timely motion to reopen, the majority position simply removes the dilemma posed by competing statutory commands and requires the Attorney General to adjudicate the motions to reopen on their respective merits, without regard to the voluntary departure issue.

In the Fifth Circuit, by contrast, it will be virtually impossible for any removal case to be reopened where voluntary departure has been granted. As noted, voluntary departure is statutorily limited to sixty days after completion of removal proceedings, and cannot be extended beyond that limit. 8 U.S.C. §1229c(b)(2), 8 C.F.R. §1240.26(f). It took the BIA approximately 13 months to consider Mr. Dada's timely motion to reopen initially, and an additional four months to consider the subsequent motion to reopen and reconsider. Such adjudications rarely take less time, and frequently take more. In *Azarte,* the motion to reopen was denied approximately six months after it was filed. *See Azarte v. Ashcroft, supra,* at 1281. It took over eight months in *Kanivets. See Kanivets v. Gonzales, supra,* at 332-33. Since the brief period of voluntary departure allowed now is considered to govern the jurisdiction of

the Attorney General to reopen proceedings, it will be virtually impossible as a practical matter to reopen removal proceedings as authorized by statute. 8 U.S.C. §1229a(c)(7).

This effect becomes even more alarming when considered in conjunction with the first issue discussed above. While the majority of Circuits now require the Attorney General to adjudicate timely motions to reopen on their merits without regard to the voluntary departure issue, in the Fifth Circuit it is no longer possible to do so. By holding that the expiration of the voluntary departure period deprives the agency of "any further jurisdiction over" the case, the Fifth Circuit holds that the Attorney General *cannot* adjudicate timely filed motions to reopen on their merits unless the decision is made within the brief time allowed before the voluntary departure period expires. This rarely happens, and it is doubtful that such a swift adjudication within the voluntary departure period is even administratively possible.

For the reasons noted, the decision below raises two compelling issues. On the first and primary issue, the Fifth Circuit is opposed by two others by holding that the voluntary departure order somehow survives the decision reopening that order. On the second, the Fifth Circuit is opposed by four others in refusing to consider the voluntary departure period tolled. On both issues, the Fifth Circuit stands alone. Therefore, intervention by this Court to resolve these conflicts is urgently needed for the reasons stated and to ensure consistency, efficiency, and justice in the application of the nation's laws.

CONCLUSION

For the reasons shown, Petitioner urges that he is legally eligible to apply for adjustment of status to lawful permanent resident as the beneficiary of an immediate relative visa petition filed on his behalf, notwithstanding that a period of voluntary departure granted in an order later considered before his application could be considered. Petitioner prays that this petition for writ of certiorari be granted.

Respectfully submitted,

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2006 WL 3420124

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-60180
Summary Calendar

SAMSON TAIWO DADA,

Petitioner,

versus

ALBERTO R. GONZALES, U.S. ATTORNEY GENERAL,

Respondent.

Petition for Review of an Order of the
Board of Immigration Appeals
BIA No. A78 129 270

(Filed Nov. 28, 2006)

Before JOLLY, DENNIS, and CLEMENT, Circuit Judges.

PER CURIAM:*

Samson Taiwo Dada is a citizen of Nigeria who was admitted into the United States in April 1998 and remained in the country beyond the authorized period. An

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

immigration judge (IJ) ordered Dada to be removed but granted his request for voluntary departure. The Board of Immigration Appeals (BIA) affirmed the IJ's decision. Dada filed a motion to reopen on the ground that he was seeking adjustment of status, and he sought leave to withdraw his request for voluntary departure. The BIA denied Dada's motion to reopen on the ground that, because he failed to leave the United States by the imposed deadline for voluntary departure, he was statutorily ineligible for adjustment of status, pursuant to 8 U.S.C. § 1229c(d).

In this petition for review, Dada argues that the BIA erred by (1) finding him to be statutorily ineligible for adjustment of status under § 1229c(d) and (2) denying his motion to reopen despite the IJ's denial of Dada's request for a continuance. The BIA's interpretation of the applicable statutes rendering Dada ineligible was reasonable. *See Banda-Ortiz v. Gonzales*, 445 F.3d 387, 389-91 (5th Cir. 2006). The IJ did not abuse its discretion by denying Dada's request for a continuance. *See Ahmed v. Gonzales*, 447 F.3d 433, 438-39 (5th Cir. 2006). Dada's arguments challenging the IJ's decision and the BIA's affirmance of that decision are not cognizable within his petition for review, which was directed at the BIA's denial of Dada's motion to reopen. *See Guevara v. Gonzales*, 450 F.3d 173, 176 (5th Cir. 2006).

Dada has failed to show that the BIA abused its discretion by denying his motion to reopen. *See Zhao v. Gonzales*, 404 F.3d 295, 303-04 (5th Cir. 2005). Accordingly, his petition for review is DENIED.

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A78 129 270 – Houston Date: Feb. 8, 2006

In re: SAMSON TAIWO DADA

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Raed Gonzalez, Esq.

ORDER:

PER CURIAM. This case was last before us on November 4, 2005, when this Board dismissed the respondent's appeal from an Immigration Judge's decision denying a continuance pending the adjudication of a visa petition filed on the respondent's behalf by his United States citizen wife. The respondent has now submitted a motion to reopen and reconsider, also asking that he be permitted to withdraw his request for voluntary departure and be granted a stay of removal until his visa petition is adjudicated. He contends that the board's prior decision was in error, citing to our holdings in *Matter of Velarde*, 23 I&N Dec. 223 (BIA 2000) and *Matter of Isber*, 20 I&N Dec. 676 (BIA 1993) in support of his claim. He further maintains that he has submitted new and material evidence in the form of an application for adjustment of status and evidence regarding the bona fides of his marriage, such that reopening is warranted.

Pursuant to section 240B(d) of the Act, 8 U.S.C. § 1229c(d), an alien who fails to depart following a grant of voluntary departure, and who has been provided written

notice of the consequences of remaining in the United States, is statutorily barred from applying for certain forms of discretionary relief. We find that the respondent is barred from applying for adjustment of status by section 240B(d) of the Immigration and Nationality Act, 8 U.S.C. § 1229c(d). An alien who remains in the United States after the scheduled date of departure is statutorily ineligible for discretionary relief. We note that neither of the cases cited by the respondent provides an exception to this rule. Therefore, because the respondent has remained in the United States after the scheduled date of departure, the respondent is not statutorily ineligible for the relief sought. Accordingly, the motion to reopen is denied.

/s/ [Illegible]
FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A78-129-270 – Houston Date: NOV 4 2005

In re: DADA, SAMSON TAIWO

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Eheman, Michael W., Esq.

ON BEHALF OF DHS: Luis, Lisa, Assistant Chief Counsel

ORDER:

PER CURIAM: The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 1003.1(e)(4).

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the alien is permitted to voluntarily depart from the United States, without expense to the Government, within 30 days from the date of this order or any extension beyond that time as may be granted by the Department of Homeland Security (DHS). *See* section 240B(b) of the Immigration and Nationality Act; 8 C.F.R. §§ 1240.26(c), (f). In the event the alien fails to so depart, the alien shall be removed as provided in the Immigration Judge's order.

NOTICE: If the alien fails to depart the United States within the time period specified, or any extensions granted by the DHS, the alien shall be subject to a civil penalty of not less than $1,000 and not more than $5,000, and shall

be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Immigration and Nationality Act. *See* section 240B(d) of the Act.

/s/ [Illegible]
FOR THE BOARD

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Houston, Texas

File A 79 129 270 September 8, 2004

In the Matter of

SAMSON TAIWO DADA,) IN REMOVAL
Respondent) PROCEEDINGS
)

CHARGE: 237(a)(1)(B) of the Immigration and Nationality Act – remaining in the United States for a period longer than permitted.

APPLICATION: Continuance for the adjudication of an I-130[1]; and voluntary departure in the alternative.

ON BEHALF OF RESPONDENT: Michael Eheman, Esquire

ON BEHALF OF DHS: Lisa Louise, Esquire
Assistant Chief Counsel

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent in this case is a native and citizen of Nigeria and he entered the United States on or around April the 10th 1998 as a non-immigrant P-3 with authorization to remain in the United States for a temporary period not to exceed August 31st 1998, however, he did remain beyond that period. Subsequently, on January the

[1] In the file is the Exhibit Number 2, a copy of the most recent I-130 filed by the petitioner, Tisha L. Williams.

4th 2004, the Government issued the charging document, charging the respondent with being removable from the United States for the reasons set forth above. The respondent was placed in removal proceedings and at the Master Calendar hearing, the initial master Calendar hearing, the Court granted the respondent's attorney a continuance for attorney preparation. That was May 13th. Four months later, the attorney for the respondent appeared and admitted the allegations in the charging document, conceded the charges, and requested that the Court grant a continuance so that the respondent could proceed with the I-130 which was filed on March 17th 2004 by his U.S. citizen wife. However, the Government opposed the request based upon the fact that the respondent had previously had an I-130 denied, which was filed by the same spouse, February 7th 2003, and it was denied because the respondent failed to provide the required documentation. The respondent through counsel, another attorney, I believe, filed a motion to reopen, and with that, filed some documentation. However, the Government denied the motion to reopen and indicated that the documentation received still didn't satisfy or provide the documentation that they requested. The court is not able to grant a continuance at this time for the adjudication of the I-130 marked as Exhibit Number 2. The document indicates that it usually takes 990 days to 999 days from the date of the receipt of the application to process this kind of case, and the Court simply could not – is not able to provide a continuance for that length of time or any amount of time that would be close to that. Thus, the Court will enter the following order:

IT IS ORDERED that the respondent's request for a continuance be denied for the reasons set forth above;

IT IS FURTHER ORDERED that the respondent's request for voluntary departure in the alternative be granted as a matter of law and discretion upon the payment of a five hundred dollar voluntary departure bond by the respondent. Should the respondent fail to depart on or before the voluntary departure date, then the voluntary departure order will become an order of removal, and the respondent will be removed to his native country of Nigeria.

CLAREASE RANKIN-YATES
Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before CLAREASE RANKIN-YATES in the matter of:

SAMSON TAIWO DADA

A 78 129 270

Houston, Texas

was held as herein appears, and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

/s/ Alesia M. Brown
Alesia M. Brown
(Transcriber)

Deposition Services, Inc.
6245 Executive Boulevard
Rockville, Maryland 20852
(301) 881-3344

6/26/05
(Completion Date)

No. 06-1181

In the Supreme Court of the United States

SAMSON TAIWO DADA, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner, after seeking and obtaining an order granting him voluntary departure, could avoid the consequences of failing to depart within the period specified in the voluntary departure order by stating subsequently that he wished to withdraw his request for voluntary departure.

2. Whether the filing of a motion to reopen removal proceedings automatically tolls the period within which an alien must depart the United States under an order granting voluntary departure.

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In the Supreme Court of the United States

No. 06-1181

SAMSON TAIWO DADA, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The per curiam opinion of the court of appeals (Pet. App. 1-2) is not published in the *Federal Reporter* but is available at 207 Fed. Appx. 425. The decisions of the Board of Immigration Appeals (Pet. App. 3-4, 5-6) and the immigration judge (Pet. App. 7-9) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 28, 2006. The petition for a writ of certiorari was filed on February 26, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Immigration and Nationality Act (INA or Act), 8 U.S.C. 1101 *et seq.*, provides that, as an alternative to formal removal proceedings or entry of a formal

removal order, "[t]he Attorney General may permit an alien voluntarily to depart the United States at the alien's own expense." 8 U.S.C. 1229c(a)(1) and (b)(1). Voluntary departure may be granted before the initiation of removal proceedings or during the course of such proceedings, 8 U.S.C. 1229c(a)(1), and also may be granted at the close of removal proceedings in lieu of ordering that the alien be removed, 8 U.S.C. 1229c(b)(1). Aliens who receive voluntary departure avoid the five to ten-year period of inadmissibility that would result from an order of removal. See 8 U.S.C. 1182(a)(9)(A). Voluntary departure also permits aliens "to choose their own destination points, to put their affairs in order without fear of being taken into custody at any time, [and] to avoid the stigma * * * associated with forced removals." *Thapa* v. *Gonzales*, 460 F.3d 323, 328 (2d Cir. 2006) (quoting *Lopez-Chavez* v. *Ashcroft*, 383 F.3d 650, 651 (7th Cir. 2004)). To qualify for a grant of voluntary departure at the close of removal proceedings, an alien must satisfy certain statutory conditions, including establishing that he "has the means to depart the United States and intends to do so." 8 U.S.C. 1229c(b)(1)(D); see 8 U.S.C. 1229c(b)(1)(A)-(C).

Because the Act provides that the Attorney General "may" permit an alien to depart voluntarily, see 8 U.S.C. 1229c(a)(1) and (b)(1), the determination whether to allow an alien to do so is discretionary with the Attorney General, and with the immigration judge (IJ) and Board of Immigration Appeals (BIA) who act on his behalf. And the Act further provides that "[t]he Attorney General may by regulation limit eligibility for voluntary departure * * * for any class or classes of aliens." 8 U.S.C. 1229c(e).

The Act prescribes that, when an alien is granted voluntary departure at the close of removal proceedings, "[p]ermission to depart voluntarily * * * shall not be valid for a period exceeding 60 days." 8 U.S.C. 1229c(b)(2).[1] An IJ who grants voluntary departure must "also enter an alternate order [of] removal," which takes effect if the alien fails to depart within the period specified in the voluntary departure order. 8 C.F.R. 1240.26(d); see 8 C.F.R. 1241.1(f). After entry of a final order, authority to extend a period of voluntary departure specified initially by an IJ or the BIA is vested in the district director or other officers of Immigration and Customs Enforcement (ICE) in the Department of Homeland Security, see 8 C.F.R. 1240.26(f), subject to the statutory maximum of 60 days in the case of voluntary departure granted at the conclusion of removal proceedings. Failure "to depart the United States within the time period specified" results, *inter alia*, in the alien's becoming "ineligible, for a period of 10 years" to receive certain forms of discretionary relief, including cancellation of removal, adjustment of status, and a subsequent grant of voluntary departure. 8 U.S.C. 1229c(d)(1)(B) (as amended by Pub. L. No. 109-162, § 812, 119 Stat. 3057); see 8 C.F.R. 1240.26(a).

b. The INA provides that an alien who has been found removable from the United States "may file one motion to reopen [the removal] proceedings" to present "new facts." 8 U.S.C. 1229a(c)(6)(A)-(B). The statute prescribes that "the motion to reopen shall be filed within 90 days of the date of entry of a final administrative

---

[1] When voluntary departure is granted before the initiation or in the course of removal proceedings, rather than at the close of such proceedings, the alien may be allowed a maximum of 120 days to depart voluntarily. 8 U.S.C. 1229c(a)(2)(A).

order of removal." 8 U.S.C. 1229a(c)(6)(C)(i). An alien who is the subject of removal proceedings and who departs the United States may not file a motion to reopen "subsequent to his or her departure." 8 C.F.R. 1003.2(d). In addition, if an alien who is the subject of removal proceedings departs the United States "after the filing of a motion to reopen," the alien's departure "constitute[s] a withdrawal of such motion." *Ibid.*

The regulations provide that, if removal proceedings are reopened, the IJ or the BIA may reinstate voluntary departure, but only "if reopening was granted prior to the expiration of the original period of voluntary departure." 8 C.F.R. 1240.26(f) and (h). Moreover, the "decision to grant or deny a motion to reopen * * * is within the discretion of the Board," and "[t]he Board has discretion to deny a motion to reopen even if the party moving has made out a *prima facie* case for relief." 8 C.F.R. 1003.2(a). Finally, the filing of a motion to reopen "shall not stay the execution of any decision made in the case," and "[e]xecution of such decision shall proceed unless a stay of execution is specifically granted by" the BIA or the IJ. 8 C.F.R. 1003.2(f).

2. Petitioner, a native and citizen of Nigeria, entered the United States on April 10, 1998, under a non-immigrant visa. The visa authorized him to remain in the United States until August 31, 1998. Petitioner, however, remained in the United States beyond the authorized period. Pet. App. 7.

In 1999, petitioner married a United States citizen, who then filed an I-130 (immediate relative) visa petition on his behalf. On February 7, 2003, the Department of Homeland Security (DHS) denied the visa petition and deemed it abandoned on the ground that the required

documentation had not been supplied. Pet. 9; Pet. App. 8; Administrative Record (A.R.) 176.

On January 4, 2004, DHS charged petitioner with being removable. On March 17, 2004, petitioner's wife filed a second I-130 visa petition on petitioner's behalf. Petitioner subsequently requested that his removal proceedings be continued to permit adjudication of the pending I-130 visa petition filed on his behalf. Pet. App. 7-8. The IJ denied a continuance, explaining that it ordinarily takes approximately 990 to 999 days to adjudicate an I-130 visa petition and that the court could not "provide a continuance for that length of time or any amount of time that would be close to that." *Id.* at 8.[2] The IJ, however, granted petitioner's request for voluntary departure in lieu of removal. *Id.* at 9.

Petitioner filed an administrative appeal to the BIA, which had the effect of rendering the IJ's order non-final and thus of suspending the voluntary departure period pending appeal. See 8 U.S.C. 1101(a)(47)(B)(i) (order becomes "final" upon affirmance by BIA); 8 U.S.C. 1229c(b)(1) (allowing Attorney General to permit voluntary departure at the conclusion of a removal proceeding under 8 U.S.C. 1229a); 8 C.F.R. 1003.6(a), 1003.39; *In re Chouliaris*, 16 I. & N. Dec. 168, 169-170 (B.I.A. 1977). On November 4, 2005, the BIA affirmed the IJ's decision without opinion. Pet. App. 5-6. The BIA's order specified that petitioner would be permitted to depart voluntarily within a period of 30 days from the date of the order. *Id.* at 5. The order also gave notice that, if peti-

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[2] The IJ also noted that the government had opposed the request for a continuance because petitioner's wife had previously filed an immediate relative petition, which had been denied by DHS because his wife had failed to supply DHS with required documentation. Pet. App. 8; see pp. 4-5, *supra*.

tioner failed to depart "within the time period specified," he would "be ineligible for a period of 10 years for any further relief under," *inter alia*, the statutory provisions governing adjustment of status. *Id.* at 5-6.

3. Petitioner did not depart the United States within the 30-day voluntary departure period specified in the BIA's order. Instead, on December 2, 2005, with two days remaining in his voluntary departure period, petitioner filed a motion with the BIA to reopen its decision in his removal proceedings and to remand the proceedings to the IJ to permit petitioner to seek adjustment of status based on the pending I-130 visa petition. Pet. 11; Pet. App. 2; A.R. 8-21. In his motion to reopen, petitioner also asserted that he was "withdraw[ing] his request for voluntary departure and instead accept[ing] an order of deportation." A.R. 10-11; see Pet. 10.

On February 8, 2006, the BIA denied petitioner's motion to reopen. Pet. App. 3-4. The BIA explained that, under 8 U.S.C. 1229c(d), "an alien who fails to depart following a grant of voluntary departure, and who has been provided written notice of the consequences of remaining in the United States, is statutorily barred from applying for certain forms of discretionary relief." Pet. App. 3-4. The BIA thus held that petitioner is "statutorily ineligible" for adjustment of status. *Id.* at 4.

4. The court of appeals affirmed in an unpublished, per curiam opinion. Pet. App. 1-2. The court held that the "BIA's interpretation of the applicable statutes rendering [petitioner] ineligible" for adjustment of status, because he did not leave the United States within the 30-day voluntary departure period, "was reasonable." *Id.* at 2 (citing *Banda-Ortiz* v. *Gonzales*, 445 F.3d 387, 389-391 (5th Cir. 2006), cert. denied, 127 S. Ct. 1874 (2007)).

ARGUMENT

1. Petitioner argues (Pet. 15-17) that his assertion in his motion to reopen that he wished to withdraw his request for voluntary departure had the effect of automatically vacating his voluntary departure order, including the requirement that he depart the United States within 30 days. See Pet. App. 5-6. That contention lacks merit and does not warrant review. Petitioner points to no authority suggesting that an alien who has applied for, and been granted, voluntary departure, can subsequently avoid the requirement that he depart the United States by a specified date simply by asserting that he wishes to withdraw his request for voluntary departure. See 8 U.S.C. 1229c(d)(1)(B) (as amended by Pub. L. No. 109-162, § 812, 119 Stat. 3057) (prescribing that an alien who fails to depart within the voluntary departure period "*shall* be ineligible for," *inter alia*, adjustment of status) (emphasis added).

There is no merit to petitioner's contention (Pet. 16) that the court of appeals' decision conflicts with the Seventh Circuit's decision in *Orichitch* v. *Gonzales*, 421 F.3d 595 (2005). *Orichitch* held that the BIA's *grant* of a motion to reopen in the circumstances of that case had the effect of vacating the BIA's prior voluntary departure order, such that the alien was no longer subject to the 10-year ineligibility period concerning her application for adjustment of status. *Id.* at 598. Even assuming that the Seventh Circuit was correct in holding that the grant of the motion to reopen had the effect of vacating the voluntary departure order, the BIA in this case did not grant petitioner's motion to reopen. Petitioner's argument instead is that his mere assertion that he wished to withdraw his request for voluntary departure

had the effect of vacating the voluntary departure period. *Orichitch* provides no support for that argument.

Moreover, the Fifth Circuit's decision in this case is unpublished and non-precedential. See Pet. App. 1 n.*. It therefore is not binding in that circuit, and as a result would not in any event give rise to a circuit conflict of the sort warranting review by this Court.

2. Petitioner contends (Pet. 18-22) that his filing of a motion to reopen had the effect of automatically tolling his voluntary departure period. The court of appeals correctly rejected that argument. Although that question has divided the courts of appeals, it does not warrant review in this case or at this time.[3]

a. The court of appeals correctly concluded, in reliance on that court's previous decision in *Banda-Ortiz* v. *Gonzales*, 445 F.3d 387 (5th Cir. 2006), cert. denied, 127 S. Ct. 1874 (2007), that petitioner's filing of a motion to reopen did not automatically toll the running of the voluntary departure period.

"Voluntary departure is a discretionary form of relief. If an alien chooses to seek it—and that choice is entirely up to the alien—it can produce a win-win situation." *Naeem* v. *Gonzales*, 469 F.3d 33, 36 (1st Cir. 2006). As the court of appeals explained in *Banda-Ortiz*, voluntary departure is "an agreed-upon exchange of benefits between an alien and the Government," 445 F.3d at 389, in that it "offer[s] an alien a specific benefit—exemption from the ordinary bars on subsequent relief—in return for a quick departure at no cost to the government," *id.* at 390 (quoting *Ngarurih* v. *Ashcroft*, 371 F.3d 182, 194 (4th Cir. 2004)). The grant of volun-

[3] The same issue is raised by the second question presented by the petition for a writ of certiorari in *Moorani* v. *Gonzales*, petition for cert. pending, No. 06-610 (filed Oct. 31, 2006).

tary departure enables an alien to avoid the five to ten-year period of inadmissibility that would result from an order of removal, see 8 U.S.C. 1182(a)(9)(A); to select the destination point; to make arrangements for departure without the threat of custody; and to avoid any stigma associated with forced removal. See, *e.g.*, *Thapa* v. *Gonzales*, 460 F.3d 323, 328 (2d Cir. 2006).

"The benefits normally associated with voluntary departure," however, "come with corollary responsibilities." *Naeem*, 469 F.3d at 37. Because a principal purpose of voluntary departure is to provide an incentive for aliens to effect a prompt departure, see *Banda-Ortiz*, 445 F.3d at 390, an alien who seeks voluntary departure at the close of removal proceedings must demonstrate the means and intent to depart the country within a brief time, see 8 U.S.C. 1229c(b)(1)(D); 8 C.F.R. 1240.26(c)(1)(iv) and (c)(3). The Act accordingly prescribes that the voluntary departure period cannot exceed 60 days when voluntary departure is granted at the close of removal proceedings (or 120 days when voluntary departure is granted before or during removal proceedings). 8 U.S.C. 1229c(a)(2)(A) and (b)(2). The statute further directs that, "if an alien is permitted to depart voluntarily * * * and voluntarily fails to depart * * * within the time period specified, the alien," *inter alia*, "shall be ineligible, for a period of 10 years" to receive certain forms of discretionary relief, including adjustment of status. 8 U.S.C. 1229c(d)(1)(B) (as amended by Pub. L. No. 109-162, § 812, 119 Stat. 3057); see 8 C.F.R. 1240.26(a).

Contrary to petitioner's argument (Pet. 16-17), the INA's provision that an alien may file one motion to reopen, see 8 U.S.C. 1229a(c)(6)(A), does not establish that the filing of such a motion automatically tolls the

voluntary departure period. Petitioner contends (Pet. 21-22) that the BIA ordinarily will not have resolved a motion to reopen before the voluntary departure period expires, and that tolling is necessary to ensure that an alien has a meaningful opportunity to seek reopening. Petitioner thus suggests that tolling is necessary in order to give effect to both the Act's provision for an alien to file a motion to reopen and its provision authorizing the Attorney General to permit voluntary departure. That argument is mistaken.

As the Fourth Circuit has explained, the "voluntary departure provision" establishing the maximum departure period of 60 or 120 days "applies to *certain* removable aliens" who qualify for that relief, "while the motion to reopen provision applies to *all* aliens subject to removal." *Dekoladenu* v. *Gonzales*, 459 F.3d 500, 505-506 (2006), petition for cert. pending, No. 06-1285 (filed Mar. 22, 2007). Indeed, only 11 percent of removable aliens were granted voluntary departure in 2005. See *id.* at 506 n.5. Accordingly, "[f]ollowing the normal rule of statutory construction, the more specific voluntary departure provision governs in those limited situations in which it applies." *Id.* at 506. Motions to reopen are unaffected in other cases.

Moreover, while the INA provides that an alien may file one motion to reopen, it confers no right to substantive relief. To the contrary, the granting of reopening is discretionary. See p. 4, *supra*. Similarly, the granting of voluntary departure is discretionary with the Attorney General, and the Attorney General is expressly authorized to limit eligibility for additional classes of aliens. See p. 2, *supra*. There accordingly is no inconsistency with the Act if, under applicable procedures, an alien who files a motion to reopen and chooses to remain

in the country until the BIA acts upon it thereby gives up the benefits of voluntary departure. See 8 U.S.C. 1229c(e).

The conclusion that the filing of a motion to reopen does not automatically toll the running of the voluntary departure period, or permit an alien to disregard his undertaking to depart within the time allowed, is strongly supported by this Court's decision in *Stone* v. *INS*, 514 U.S. 386 (1995). There, the Court held that a final order of deportation remains final notwithstanding the filing of a motion to reopen, and that the time for filing a petition for judicial review of that order therefore is not tolled by the filing of a motion for reconsideration. See *id.* at 392-395. In reaching that conclusion, the Court pointed out that it was the longstanding position of the Attorney General, "a view we presume Congress understood when it amended the Act in 1990," that the filing of a motion for reconsideration (or reopening) does not serve to stay the deportation order. *Id.* at 398 (citing 8 C.F.R. 3.8 (1977)). Similarly, here, we must presume that Congress understood that rule when it enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, and the current regulations embody the same rule. See 8 C.F.R. 1003.2(f). Because a provision in a BIA decision allowing voluntary departure is simply an alternative to a formal removal order in the same BIA decision—allowing the alien to depart on his own within a specified period of time rather than being removed by the government—it follows from that regulation that the voluntary departure

requirement of the decision is likewise not stayed or tolled by the filing of a motion to reopen.[4]

By contrast, "mandat[ing] tolling of the voluntary departure period when an alien files a motion to reopen would have the effect of rendering the time limits for voluntary departure meaningless." *Dekoladenu*, 459 F.3d at 506; see *Banda-Ortiz*, 445 F.3d at 390 ("Automatic tolling would effectively extend the validity of [an alien's] voluntary departure period well beyond the sixty days that Congress has authorized."). Accepting petitioner's tolling argument also would substantially deny the government the benefits of voluntary departure—*i.e.*, securing a prompt departure without the need to devote the resources that attend the process of issuing and executing an order of removal—without requiring petitioner to bear the associated costs. *Ibid.* "If filing a motion to reopen automatically tolled the voluntary departure period, aliens who have been granted voluntary departure would have a strong incentive to file a motion to reopen in order to delay their departure." *Dekoladenu*, 459 F.3d at 506; compare *Stone*, 514 U.S. at 400-401 (explaining that because a removal order remains final and subject to execution notwithstanding the filing of a motion for reconsideration, Congress has removed the incentive for aliens to file meritless motions). And "[b]ecause voluntary departure is a privilege that is only available to a subset of removable aliens, it is nei-

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[4] Indeed, the BIA held, prior to IIRIRA, that the filing of a motion to reopen did *not* toll the voluntary departure period. See *In re Shaar*, 21 I. & N. Dec. 541 (B.I.A. 1996). Contrary to the Ninth Circuit's view in *Azarte* v. *Ashcroft*, 394 F.3d 1278, 1286-1287 (2005), there is no indication that Congress intended to overturn that rule when it enacted IIRIRA, which, after all, imposed additional statutory restrictions on both voluntary departure and motions to reopen.

ther 'absurd' nor 'nonsensical' to require aliens who wish to reap the benefits of voluntary departure to give up their right to a resolution of a motion to reopen." *Dekoladenu*, 459 F.3d at 506.

The Fourth Circuit concluded in *Dekoladenu* that "both the plain language of the statute and clear congressional intent explicitly limit the time allowed for voluntary departure and do not allow for judicial tolling of these limits" based on the filing of a motion to reopen. 459 F.3d at 504. But even if the relevant statutory provisions are regarded as ambiguous on the matter, the agency's conclusion that the filing of a motion to reopen does not automatically toll the voluntary departure period under the existing statutory and regulatory scheme would be entitled to deference. See *id.* at 507-508; *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 425 (1999).

The BIA's voluntary departure order in this case specifically informed petitioner that failure to depart within 30 days of the order would trigger the ten-year period of ineligibility for adjustment of status. See Pet. App. 5-6; see also 8 U.S.C. 1229c(d) ("The order permitting the alien to depart voluntarily shall inform the alien of the penalties under this subsection."). Moreover, the governing regulations provide that an IJ or the BIA "may reinstate voluntary departure in a removal proceeding that has been reopened * * * *if reopening was granted prior to the expiration of the original period of voluntary departure*," and further provide that "[i]n no event can the total period of time, including any extension, exceed 120 days or 60 days as set forth in" the Act. 8 C.F.R. 1240.26(h) (emphasis added). The evident corollary is that, if reopening is *not* granted "prior to the expiration of the original period of voluntary departure," no reinstatement of voluntary departure or extension of

the voluntary period is permissible. Petitioner filed his motion to reopen only two days before the expiration of his voluntary departure period, see p. 6, *supra*, and therefore was plainly on notice of the likelihood that the BIA would not act on his motion before the voluntary departure period expired.

b. As petitioner correctly explains, the courts of appeals are divided on whether the filing of a motion to reopen automatically tolls the voluntary departure period. Four courts of appeals have held that the filing of a motion to reopen automatically triggers such tolling. See *Kanivets* v. *Gonzales*, 424 F.3d 330 (3d Cir. 2005); *Sidikhouya* v. *Gonzales*, 407 F.3d 950 (8th Cir. 2005); *Azarte* v. *Ashcroft*, 394 F.3d 1278 (9th Cir. 2005); *Ugokwe* v. *United States Att'y Gen.*, 453 F.3d 1325 (11th Cir. 2006). Two courts of appeals (including the court below) have reached the contrary conclusion. See *Dekoladenu* v. *Gonzales*, 459 F.3d 500 (4th Cir. 2006), petition for cert. pending, No. 06-1252 (filed Mar. 22, 2007); *Banda-Ortiz* v. *Gonzales*, 445 F.3d 387 (5th Cir. 2006), cert. denied, 127 S. Ct. 1874 (2007).

Although the courts of appeals are divided on the question, review is not warranted in this case or at this time. First, in light of the judicial decisions and issues that have been raised, the Department of Justice has determined that it will promulgate regulations specifically regarding the tolling question presented by this case. That rulemaking process will afford the Department an opportunity to address the various statutory provisions bearing on reopening and voluntary departure, consider the various policy issues that have been raised, and further exercise the authority and discretion vested in the Attorney General under the relevant statu-

tory provisions. Review of the tolling issue by this Court should await the issuance of such regulations.[5]

Second, the Senate and the House of Representatives passed bills in the last Congress that contained provisions that would definitively resolve the tolling issue on a prospective basis in a manner consistent with the Fifth Circuit's decision in this case. See S. 2611, 109th Cong., 2d Sess. § 211(a)(3) (2006); H.R. 4437, 109th Cong., 1st Sess. § 208(b)(1) (2005). Comprehensive immigration reform is also under active consideration in the current Congress.[6] Thus, not only does the Department of Justice plan to address the issue by regulation, but there also is a prospect that Congress will do so.

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[5] In 1997, when the Department, after notice and comment, promulgated interim regulations implementing the 1996 amendments to the INA, it discussed the tolling issue in the preamble and stated that the issue would be addressed when final regulations were issued on a variety of subjects. See 62 Fed. Reg. 10,312, 10,326. No such comprehensive regulations have been issued. However, as stated in the text, the Department has now determined that further regulations will be issued on the specific question of tolling presented in this case.

[6] In addition, we have been informed that the tolling issue has been raised in a number of cases pending before the BIA.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

SAMSON TAIWO DADA,

Petitioner,

v.

ALBERTO GONZALES,
UNITED STATES ATTORNEY GENERAL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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This petition presents an important question concerning the nation's immigration laws on which there is a square—and growing—conflict among the courts of appeals: whether a timely-filed motion to reopen removal proceedings, 8 U.S.C. § 1229a(c)(7), tolls the period of voluntary departure, 8 U.S.C. § 1229c. In fact, since the Government filed its Opposition, the conflict has deepened to a 4-3 split. *See Chedad* v. *Gonzales*, No. 05-2782, 2007 U.S. App. LEXIS 18185 (1st Cir. July 31, 2007); *see also id.* at *25 (Lipez, J., dissenting).

The Government does not dispute the existence of a conflict or the importance of the issue. Rather, the Government simply argues that the question may someday be resolved through regulations or legislation. Such a possibility, however, does not obviate the need for this Court's immediate review. Any regulations on this issue are a mere possibility, and the Government has not identified any steps taken toward the development or issuance of pertinent rules. And even if regulations will ultimately address this issue, these regulations will likely not take effect for years. In the meantime, tens of thousands of aliens will face differing treatment depending on which circuit happens to decide their case. The prospect of legislation resolving this conflict is even less likely. Indeed, the immigration bills that the Government cites, which offered the prospect of "[c]omprehensive immigration reform," have been abandoned.

The pressing need for this Court's review is apparent from the Court's own docket. In addition to this petition, there are two other petitions for certiorari pending that raise the same question. *See Dekoladenu* v. *Gonzales*, *petition for cert. pending*, No. 06-1285 (filed Mar. 22, 2007); *Moorani* v. *Gonzales*, *petition for cert. pending*, No. 06-610 (filed Oct. 31, 2006). The Court should, however, grant the petition in this case: this petition presents an appropriate vehicle for resolving the question, as there are no apparent obstacles to the Court's review and the case directly implicates the circuit split. *See generally* Part III *infra*.

ARGUMENT

I. THE GOVERNMENT DOES NOT DISPUTE THE CIRCUIT SPLIT ON THIS ISSUE, WHICH HAS RECENTLY DEEPENED

As the Government recognizes (Opp. 14), the courts of appeals are squarely divided on whether a timely motion to reopen tolls the voluntary departure period. Seven courts of appeals, including the First Circuit late last month, have weighed in on this issue, creating a 4-3 split. *Compare Ugokwe* v. *U.S. Att'y Gen.*, 453 F.3d 1325 (11th Cir. 2006) (filing a timely motion to reopen removal proceedings tolls the voluntary departure period); *Kanivets* v. *Gonzales*, 424 F.3d 330 (3d Cir. 2005) (same); *Sidikhouya* v. *Gonzales*, 407 F.3d 950 (8th Cir. 2005) (same); *Azarte* v. *Ashcroft*, 394 F.3d 1278 (9th Cir. 2005) (same), *with Chedad* v. *Gonzales*, No. 05-2782, 2007 U.S. App. LEXIS 18185 (1st Cir. July 31, 2007) (a timely motion to reopen does not toll the voluntary departure period); *Dekoladenu* v. *Gonzales*, 459 F.3d 500 (4th Cir. 2006) (same); *Banda-Ortiz* v. *Gonzales*, 445 F.3d 387 (5th Cir. 2006) (same), *cert. denied*, 127 S. Ct. 1874.

The dispute over the issue is not limited to disagreement among the circuits. Two of the three opinions holding that a motion to reopen does not toll the voluntary departure period were accompanied by a dissent on this issue. *Chedad*, 2007 U.S. App. LEXIS 18185, at *25 (Lipez, J., dissenting); *Banda-Ortiz*, 445 F.3d at 391 (Smith, J., dissenting). The third opinion so holding was accompanied by a concurrence objecting to the broad approach of the majority. *Dekoladenu*, 459 F.3d at 509 n.* (Gregory, J., concurring). And in *Banda-Ortiz*, five judges of the Fifth Circuit dissented from the denial of rehearing en banc. *Banda-Ortiz* v. *Gonzales*, 458 F.3d 367, 368 (5th Cir. 2006) (Smith, J., dissenting from denial of rehearing en banc) (joined by Jones, C.J., and Benavides, Stewart, and Dennis, J.J.).

II. THE MERE PROSPECT OF REGULATIONS OR LEGISLATION RESOLVING THE TOLLING QUESTION DOES NOT SUPPORT A DENIAL OF THE PETITION FOR CERTIORARI

The Government's only argument for denying the petition for certiorari is that the tolling question may—at some unspecified point in the future—be resolved either through regulations or legislation. Relevant regulations, however, are a mere possibility and, regardless, do not eliminate the need for this Court's review. The possibility of legislation is even more remote.

1. The Government states that the Department of Justice "has determined that it will promulgate regulations" on this issue. Opp. 14. The Government, however, has offered no timeframe within which the Department expects to act, no details of any actions taken to draft or promulgate such regulations, and no description of particular provisions that would purportedly resolve this question. Nor has it indicated any steps taken since it first made this representation nearly six months ago. *Moorani* Opp. 19.

Moreover, despite the Department of Justice's current intentions, it may decide, in the end, not to issue regulations on this topic. In fact, this is precisely what occurred a decade ago: In 1997, the Department stated that it would issue regulations on the tolling question after notice and comment, 62 Fed. Reg. 10,312, 10,325-10,326 (Mar. 6, 1997), but, as the Government acknowledges, no such regulations were ever issued, Opp. 15 n.5.

In any event, even if regulations will ultimately address the tolling question, it will be years before any rule takes effect. One recent study found that the average time between proposal and finalization of a rule was 322 days. *See* S. Shapiro, *Two Months in the Life of the Regulatory State*, 30 Admin. & Reg. L. News 12, 15 (Spring 2005). For rules issued after public comment—which the Department specifically stated that it wished to solicit when it previously considered issuing such regulations, 62 Fed. Reg. 10,312, 10,326—the average time was 423 days. Shapiro, *supra*, at 15; *see also* S. Breyer et al., *Administrative Law and Regu-*

latory Policy: Problems, Text, and Cases 565 (2006) (concluding that, for one agency (the EPA), the average time between notice of a proposed rule and promulgation of a final rule is 16 months). And these time periods do not take account of the time needed to draft the rule. A 1993 report estimates that 12-18 months are needed to develop a draft rule, with another 12-18 months allotted for the rule to issue in final form. *See Improving Regulatory Systems*, Accompanying Report Of The National Performance Review, Office of the Vice President (1993) (executive summary).

In the meantime, the effects of the split in the courts of appeals will be widely felt because the question arises in many cases and carries consequences even more broadly.[1] Over the course of the last five years, immigration judges granted voluntary departure in well over 100,000 cases, which constituted between 10% and close to 20% of all removal decisions each year. *See* U.S. Department of Justice Executive Office for Immigration Review *FY 2006 Statistical Year Book* Q1 (Feb. 2007) (*FY 2006 Statistical Year Book*). Over 22,000 individuals were granted voluntary departure in 2006 alone. *Id.*[2]

The tolling question is potentially relevant to any of the thousands of aliens granted voluntary departure each year

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[1] Of course, the effects of the current confusion will likely continue even after any such potential regulations are issued, as the regulations will presumably operate prospectively only. *See, e.g., Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("[A] statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms."); *see also id.* at 216 (Scalia, J., concurring) (concluding that the definition of "rule" in Administrative Procedure Act, 5 U.S.C. § 551(4), requires that "rules have legal consequences only for the future"). There is no suggestion of retrospective application in the statutory provisions. 8 U.S.C. §§ 1103(a)(3), 1103(g)(2), 1229c(e).

[2] During this same five year period, the BIA adjudicated approximately 45,000 motions to reopen and more than 12,000 additional appeals from the decisions of immigration judges on motions to reopen. *FY 2006 Statistical Year Book* T2.

as it can affect the decision whether to attempt to reopen proceedings. And, because the tolling question affects the opportunity to reopen proceedings, the no-tolling rule of several circuits and the uncertainty in others may create a disincentive for aliens to move for voluntary departure, thereby undercutting the value of this mechanism that permits immigration judges "to quickly and efficiently dispose of numerous cases on their docket." *In re Arguelles-Campos*, 22 I. & N. Dec. 811, 817 (BIA 1999). A review of circuit court decisions confirms the frequency with which the tolling question arises.[3]

In light of the conflicting authority and uncertainty faced by aliens in removal proceedings, this Court should grant review in this case to bring needed uniformity to this

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[3] In addition to *Moorani* v. *Gonzales*, 182 Fed. Appx. 352 (5th Cir. May 26, 2006), *Dekoladenu*, and the other cases cited as part of the circuit split, there are many more court of appeals decisions addressing this issue. *See, e.g.*, *Cabrera-Benavidez* v. *Gonzales*, No. 06-60641, 2007 WL 1579979 (5th Cir. May 31, 2007); *Moti* v. *Gonzales*, 212 Fed. Appx. 277 (5th Cir. Dec. 19, 2006); *Abbas* v. *Gonzales*, 208 Fed. Appx. 337 (5th Cir. Dec. 7, 2006); *Tapia-Soriano* v. *Gonzales*, 201 Fed. Appx. 461 (9th Cir. Sept. 11, 2006); *Ali* v. *Gonzales*, 196 Fed. Appx. 314 (5th Cir. Aug. 28, 2006); *Garcia-Herrera* v. *Gonzales*, 168 Fed. Appx. 762 (9th Cir. Feb. 13, 2006); *Castro* v. *Gonzales*, 197 Fed. Appx. 583 (9th Cir. Feb. 7, 2006); *Atilano-Garcia* v. *Gonzales*, 159 Fed. Appx. 773 (9th Cir. Dec. 19, 2005); *Guerrero-Acosta* v. *Gonzales*, Nos. 03-71098 & 03-74576, 2005 U.S. App. LEXIS 17398 (9th Cir. Aug. 12, 2005); *Peraza-Penuelas* v. *Gonzales*, 136 Fed. Appx. 999 (9th Cir. June 30, 2005); *Williams* v. *Gonzales*, 127 Fed. Appx. 700 (5th Cir. Apr. 4, 2005); *Flores-Contreras* v. *Gonzales*, 127 Fed. Appx. 910 (9th Cir. Apr. 1, 2005); *Gamez* v. *Ashcroft*, 104 Fed. Appx. 118 (9th Cir. July 27, 2004); *see also Barroso* v. *Gonzales*, 429 F.3d 1195 (9th Cir. 2005) (extending tolling rule to motions to reconsider); *Ortiz* v. *Gonzales*, No. 06-60643, 2007 WL 1579976 (5th Cir. May 31, 2007); *Chowdhury* v. *Gonzales*, 187 Fed. Appx. 417 (5th Cir. June 29, 2006); *Khan* v. *Gonzales*, 184 Fed. Appx. 424 (5th Cir. June 8, 2006). At least two other circuits have been presented with the question but disposed of the matter on other grounds. *Martinez-Espino* v. *Gonzales*, 205 Fed. Appx. 421, 423-424 (6th Cir. Dec. 14, 2006) (discussing circuit split but finding motion to reopen untimely); *Hadayat* v. *Gonzales*, 458 F.3d 659, 664 (7th Cir. 2006) (discussing circuit split on tolling voluntary departure period in context of motion for reconsideration).

important question. *Cf. Zadvydas* v. *Davis*, 533 U.S. 678, 700-701 (2001) (recognizing the importance of "uniform administration [of immigration law] in the federal courts").

2. Legislation resolving the tolling question is a hypothetical possibility that does not warrant a denial of this petition.

The Government asserted in its Opposition that legislation pending at the time "would definitively resolve the tolling issue on a prospective basis" as part of "[c]omprehensive immigration reform." Opp. 15 (citing S. 2611, 109th Cong., 2d Sess. § 211(a)(3) (2006); H.R. 4437, 109th Cong., 1st Sess. § 208(b)(1) (2005)). Both S. 2611 and H.R. 4437, however, faced ample opposition and ultimately failed. *See, e.g.*, Pear & Hulse, *Immigrant Bill Dies in Senate*, N.Y. Times, June 29, 2007, at A1.

Even if relevant legislative proposals are introduced, a grant of certiorari is nonetheless appropriate. There is no reason to presume that any subsequent legislative initiatives will avoid a similar fate, or that any final legislation would resolve the particular question at issue here. Moreover, the Government has routinely filed petitions of certiorari, and this Court has granted review, in the face of pending legislation, including legislation that is far along in the legislative process. *See, e.g.*, *Gonzales* v. *Duenas-Alvarez*, No. 05-1629, Pet. Reply 10 n.8, 2006 WL 2581844 (Sept. 6, 2006) (noting that no conference committee had been convened, although bills had been passed by both Houses, and "thus it remains uncertain whether legislation addressing the question presented in this case will be passed"), *cert. granted*, 127 S. Ct. 35 (Sept. 26, 2006).[4]

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[4] *See also Commissioner of Internal Revenue* v. *Banks*, No. 03-892, Pet. Reply 9, 2004 WL 530980 (Mar. 11, 2004) (arguing that "pending legislation ... does not remove the need for this Court's review" because "the legislation has merely been proposed, and it is far from clear that it will ever be enacted into law, much less enacted soon enough to reduce the need for this Court's review"), *cert. granted*, 124 S. Ct. 1712 (Mar. 29, 2004); *United States* v. *Florida Bd. of Regents*, No. 98-796, Pet. Reply 4,

III. THE COURT SHOULD GRANT REVIEW IN THIS PARTICULAR CASE AS THE TOLLING QUESTION IS SQUARELY PRESENTED AND THERE ARE NO OBSTACLES TO THIS COURT'S REVIEW

In this case, the tolling question is squarely before the Court. Petitioner filed a motion to reopen his removal proceedings prior to the expiration of his voluntary departure period in an attempt to obtain an adjustment of status. Pet. 11; Opp. 6; Admin. Record 8-21. Subsequently, the BIA denied this motion on the ground that Petitioner had failed to depart during the voluntary departure period. Pet. App. 3-4. The Fifth Circuit, relying on its previous decision in *Banda-Ortiz*, affirmed. Pet. App. 1-2. And Petitioner now seeks review of that question—whether he is subject to penalties because he failed to depart within the voluntary departure period or, rather, whether the filing of the motion to reopen tolled the voluntary departure period. Pet. i (Question Presented #2). If the Court grants review in this case, there are no apparent obstacles that will prevent resolution of this important question.

Moorani, however, has a complicated procedural history that may pose vehicle problems. *See, e.g., Moorani* Pet. Questions Presented #1 & #3. As the *Moorani* Petition indicates, the basis for the agency's decision was not clear, and the Fifth Circuit "assume[d]" the basis of the agency's decision. *Moorani* Pet. App. 4 n.7; *see also Moorani* Pet. 24-26; *id.* Question Presented #3. As a result, it is unclear whether the agency decided the question presented for review. *See Moorani* Pet. Question Presented #3; *see generally SEC* v. *Chenery*, 318 U.S. 80, 87 (1943) ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."). Additionally, the Fifth Circuit's opinion in *Moorani* raises a question about the agency's jurisdiction at the time the agency issued

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1998 WL 34080927 (Dec. 30, 1998) ("There is no sound basis for permitting a deep circuit conflict concerning important federal legislation to persist pending a purely hypothetical legislative response."), *cert. granted sub nom. Kimel* v. *Florida Bd. of Regents*, 119 S. Ct. 901 (Jan. 25, 1999).

the ambiguous decision at issue. *Moorani* Pet. App. 5 (holding that, even prior to the administrative decision at issue in the petition, "the agency lacked any further jurisdiction over Moorani's case"); *see also Moorani* Pet. Question Presented #1.

CONCLUSION

For the foregoing reasons, as well as those contained in the Petition for Certiorari, the petition should be granted.

Respectfully submitted.

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IN THE

Supreme Court of the United States

SAMSON TAIWO DADA,

Petitioner,

v.

MICHAEL B. MUKASEY,
ATTORNEY GENERAL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The statutory provisions governing motions to reopen and voluntary departure need to be reconciled. The Government reads the voluntary departure provision in isolation; this interpretation eliminates motions to reopen, a procedure that Congress made available to all aliens, for an arbitrary subset of the favored group of aliens granted voluntary departure. None of the various bases the Government supplies for its construction—the language of the provision, the legislative history, and assorted regulations—supports this incongruous result.

Tolling, by contrast, is consistent with the statute and offers a way to give meaning to both provisions, safeguarding motions to reopen for the favored aliens granted voluntary departure. Accordingly, this Court should interpret the statute to permit tolling of the voluntary departure period during the pendency of a motion to reopen. The Government's concerns about a tolling rule are misplaced. And it cannot avoid tolling by claiming deference to agency positions; there is no authoritative agency view on tolling that warrants deference. Indeed, any reading that would effectively deny a voluntary departure recipient the ability to seek reopening would be inconsistent with the statute.

The Government's arguments are further undercut by the Department of Justice's newly proposed rule, which offers an alternative to tolling that likewise harmonizes the two statutory provisions. Under the proposed rule, which would only apply prospectively, the filing of a motion to reopen would terminate the grant of voluntary departure, allowing the alien to await a decision on his motion to reopen without facing penalties. 72 Fed. Reg. 67,674, 67,679 (Nov. 30, 2007). Recognizing the important role of motions to reopen for aliens facing changed circumstances, the rule "ensures

that the alien is not subsequently penalized when such change in circumstances occurs." *Id.* Like tolling, this approach avoids the arbitrary and anomalous consequences of the Government's construction and, though it is not due deference, offers the Court an alternative interpretation of the statute.

ARGUMENT

I. THE GOVERNMENT'S CONSTRUCTION, UNDER WHICH A VOLUNTARY DEPARTURE RECIPIENT IS EFFECTIVELY DENIED A MOTION TO REOPEN, IS INCONSISTENT WITH THE STATUTE

A. The Government's Interpretation Improperly Focuses On The Voluntary Departure Provision In Isolation

Reading the voluntary departure provision in isolation, the Government erroneously argues (at 14-15, 19-20) that the language of the provision sets an absolute deadline that cannot be tolled. Yet this Court's precedent demonstrates that statutory provisions must be read in context and, furthermore, that a provision seemingly clear in isolation may become ambiguous in context.

In *Costello* v. *INS*, 376 U.S. 120 (1964), the Court considered the intersection of various immigration provisions and read the provisions together as a whole. In particular, although one of the provisions at issue was seemingly plain on its face, the Court concluded that the language was ambiguous when considered in relation to another provision, because the statute did not specify how the two provisions should interact. 376 U.S. at 128-129 (analyzing relation-back provision); *see also* Pet. Br. 17-18 & n.7. As in *Costello*, this Court should refuse to adopt a construction of one provision that would "render nugatory and meaningless for an entire class of aliens" the discretionary relief at issue.

376 U.S. at 132; *see also id.* at 127-128 (declining to adopt a construction that "would, with respect to an entire class of aliens, completely nullify a procedure so intrinsic a part of the legislative scheme").

That sufficient ambiguity to permit tolling exists in the statutory scheme was suggested by the Department itself. In 1997, when the Department first considered the interaction of the two provisions at issue here, it listed tolling as a possible solution. *See* 62 Fed. Reg. 10,312, 10,325-10,326 (Mar. 6, 1997).

This view was well founded: the voluntary departure provision is not phrased like other deadlines in the Immigration and Nationality Act (INA), but, rather, passively describes a "period" during which "[p]ermission to depart" remains "valid." 8 U.S.C. § 1229c(b)(2). Other deadlines in the INA, by contrast, require an affirmative act to take place within a set time period. *See* Pet. Br. 17 n.6.

B. The Government's Reading Relies On A Misunderstanding Of The Voluntary Departure Bargain

The Government also argues (at 13-16, 18, 28-30) that forfeiture of a motion to reopen is part of the quid pro quo between the Government and the alien. The Government, however, is mistaken about the benefits and burdens that accompany voluntary departure.

1. The Government suggests (at 18, 27, 33) that the Court should read the statute to eliminate motions to reopen for aliens granted voluntary departure because one of the key benefits to the Government of voluntary departure is the termination of all litigation with the alien. Yet it is undisputed that an alien who seeks voluntary departure at the conclusion of proceedings (such as Petitioner) is *not* required to waive other

appeals. As the Government acknowledges, such aliens can pursue appeals to the Board of Immigration Appeals (BIA) and can also file petitions for review with the courts of appeals. Gov't Br. 6, 8; *see also* 72 Fed. Reg. 67,674, 67,676 (Nov. 30, 2007) ("[u]nder the current regulations" such an alien "is still able to file an appeal to the Board"); *id.* at 67,678 (may file petition for review with court of appeals); C.A. App. 167 (Petitioner expressly "reserve[d] appeal"); Pet. Br. 24-27.[1] Because litigation is not concluded upon a grant of voluntary departure, this benefit to the Government is not part of the quid pro quo and cannot justify eliminating motions to reopen for these aliens.

2. Nor does the Government's concern with delay (at 33-34) support a conclusion that Congress intended waiver of motions to reopen as part of the quid pro quo. Motions to reopen are, in fact, decided relatively quickly. *See* American Immigration Law Foundation Amicus Br. 20-23 (motions to reopen generally decided by immigration judge and Board in fewer than 60 or 90 days, respectively); 8 C.F.R. § 1003.1(e)(5) (motions to reopen generally assigned to Board member who decided original appeal, which permits familiarity with the record); Pet. Br. 10 (Petitioner's motion to reopen decided in roughly two months). By contrast, petitions for review to the courts of appeals take much longer. *See* 72 Fed. Reg. at 67,681. Given the relative speed with which motions to reopen are decided, it makes little sense to conclude that Congress intended aliens to

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[1] The courts of appeals that have refused to adopt a tolling rule have wrongly suggested than an alien who accepts voluntary departure must waive certain litigation rights. *See* Pet. Br. 25-26 & n.17.

be able to pursue all other appeals, but waive only their statutory right to seek reopening.

3. The Government mistakenly suggests (at 29) that the filing of a motion to reopen is inconsistent with the terms of the voluntary departure bargain because, under the statute, a voluntary departure applicant must have a current intent to depart. *See* 8 U.S.C. § 1229c(b)(1)(D). This argument, however, misapprehends the fundamental purpose of a motion to reopen, thereby ignoring the important role these motions play. Under the statute and regulations, a motion to reopen is limited to *changed circumstances*. Specifically, such motions are limited to "new facts," *id.* § 1229a(c)(7)(B), *i.e.*, "circumstances that have arisen subsequent to the hearing," 8 C.F.R. § 1003.2(c)(1).[2] By definition, then, an alien could not know about these facts and circumstances at the time he accepts voluntary departure. Indeed, the Department of Justice's proposed rule is premised on the fact that "an alien may request voluntary departure in good faith," but then be faced with changed circumstances that would trigger eligibility for a motion to reopen. 72 Fed. Reg. at 67,679.

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[2] For example, new facts might arise that relate to cancellation of removal. *See* 8 U.S.C. § 1229b(b)(1)(D); *Azarte* v. *Ashcroft*, 394 F.3d 1278, 1280-1281 (9th Cir. 2005) (alien's child diagnosed with mental disabilities that required intensive therapy). Or an alien's spouse may naturalize to become a citizen while the case is on direct appeal to the BIA, *see, e.g.*, *Chedad* v. *Gonzales*, 497 F.3d 57, 59 (1st Cir. 2007), which would make him immediately eligible for an adjustment of status to that of a lawful permanent resident, *see* 8 U.S.C. § 1255(a). These new facts can arise at any time after the immigration judge's initial decision, including while an appeal is pending before the Board. *See, e.g.*, 72 Fed. Reg. at 67,679.

C. The Government's Reliance On The Legislative Evolution Of Each Provision In Isolation Fails

The Government is also mistaken in its attempt to extract a congressional purpose to preclude tolling from the evolution of the motion to reopen and voluntary departure provisions. Gov't Br. 23-28, 33-34.

1. The Government asserts (at 33) that motions to reopen are "disfavor[ed]," and that Congress's action in 1996 reflected this disfavor. This argument, however, is undercut by the fact that Congress chose to codify motions to reopen in 1996. And, in doing so, Congress took care to provide contours to the right: permitting one motion to reopen, which raises new facts, to be filed within 90 days. 8 U.S.C. § 1229a(c)(7)(B), (C)(i). Congress took this action, moreover, after considering the issue for years, and only after the Attorney General found "no pattern of abuse." *See* Pet. Br. 3.

The support the Government offers for its argument that this newly codified and carefully defined right was disfavored consists of case law prior to 1996. Needless to say, these cases do not establish Congress's disfavor towards its subsequent, carefully codified right. These cases, moreover, date from a time when an alien was permitted to file multiple motions, and at any time. *See* Gov't Br. 33; *see also* Pet. Br. 3 n.1.

2. The Government's reliance (at 23-26) on the evolution of the voluntary departure provision also fails. While it is true that Congress placed time limits on voluntary departure in 1996, and eliminated an exception, these amendments do not speak to Congress's view on the interaction of the voluntary departure and motion to reopen provisions or the question of tolling. There is simply no indication that Congress considered this issue, and the Government does not suggest oth-

erwise. *See* Pet. Br. 19-20 & nn.9-10; *see also INS* v. *St. Cyr*, 533 U.S. 289, 320 n.44 (2001) (absence of consideration noteworthy given the "comprehensive character" of the legislative history of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)).

3. The Government's related arguments (at 26) concerning the "essential purpose of IIRIRA's amendments to the voluntary departure provision"[3] fare no better. This Court has rejected reliance on generalized legislative purposes to answer a specific interpretative question. In *Costello*, for example, although "[t]he general legislative purpose underlying enactment of [the deportation provision at issue] was to broaden the provisions governing deportation," "reference to such a generalized purpose does little to promote resolution of the specific problem before us, of which there was absolutely no mention in the Committee Reports or other legislative materials." 376 U.S. at 125-126; *see also, e.g.*, *Bifulco* v. *United States*, 447 U.S. 381, 398-399 (1980).

Moreover, to the extent the Government seeks to rely on IIRIRA's overarching purpose, its description of that purpose is too narrow. As described in Petitioner's brief, one of Congress's primary concerns in passing IIRIRA was to enact reform with respect to criminal aliens, and Congress was particularly concerned about such aliens abusing motions to reopen. A no-tolling rule, then, would turn Congress's intent on its head, as criminal aliens would be entitled to a motion

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[3] The Government quotes (at 26) *Stone* v. *INS*, 514 U.S. 386, 399 (1995), a case decided *before* IIRIRA's enactment, to support its articulation of IIRIRA's purpose with respect to voluntary departure.

to reopen—but the favored subset of aliens who receive voluntary departure would not. Pet. Br. 29-33.

Indeed, at least some aliens accused of terrorist activities are permitted to file motions to reopen, *see Daneshvar* v. *Ashcroft*, 355 F.3d 615, 626, 629 (6th Cir. 2004) (reversing BIA's denial of motion to reopen of alien found inadmissible for having engaged in terrorist activities); *see also Choub* v. *Gonzales*, 2007 WL 2316919, at *1-2 (9th Cir. Aug. 14, 2007) (noting that alien who provided "material support" to a terrorist organization "may seek relief by filing a motion to reopen with the BIA"); but, under the Government's view, those who have established "good moral character," 8 U.S.C. § 1229c(b)(1)(B), are not. This Court should reject such an anomalous result. *See Small* v. *United States*, 544 U.S. 385, 393 (2005).[4]

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[4] The Government's argument (at 32) that the "specific" (voluntary departure provision) governs the supposedly "general" (motion to reopen provision) and thus bars tolling is without merit. Unlike in the one case cited (at 32) by the Government, *Long Island Care at Home, Ltd.* v. *Coke*, 127 S. Ct. 2339 (2007), where the provisions concerned the same subject matter, the two provisions here plainly do not. *See Edmond* v. *United States*, 520 U.S. 651, 656-658 (1997) (canon inapplicable where two provisions dealt with separate issues—appointment and assignment of judges); *see also* Singer, 2B *Statutes and Statutory Construction* § 51.05 (6th ed. 2000). Nor is there any indication that Congress intended the voluntary departure provision "as a *limitation*" on the motion to reopen provision. *Varity Corp.* v. *Howe*, 516 U.S. 489, 511 (1996) (stating canon "has [been] understood ... as a warning against applying a general provision when doing so would undermine limitations created by a more specific provision"; declining to apply the doctrine where there was no indication "that Congress intended the specific remedies ... as a *limitation*" (emphasis in original)).

D. The Government's Construction Raises Serious Constitutional Concerns

The Government fails to address the due process and equal protection concerns raised by its statutory construction under which arbitrary government action eliminates congressionally-provided motions to reopen for a subset of aliens granted voluntary departure.

The Government asserts (at 49) that constitutional avoidance does not permit tolling because it would "subvert" congressional intent. There is no evidence, however, that Congress intended to eliminate motions to reopen for an arbitrary subset of aliens granted voluntary departure. *See* Part I.A-C *supra*.

The Government offers no other arguments relevant to Petitioner's liberty interest in remaining in this country—apparently conceding that such a liberty interest exists under the Due Process Clause, that it is protected by the motion to reopen, and that arbitrary deprivation of procedures safeguarding constitutionally protected interests is inconsistent with due process. Pet. Br. 39-42. These constitutional concerns, accordingly, favor an alternative construction of the statute, such as tolling, that preserves the procedures Congress made available to safeguard the alien's interest in remaining in this country.

With regard to Petitioner's separate argument based on his property interest in the motion to reopen itself, the Government appears to concede (at 50) that due process concerns could arise upon a showing of a "cognizable interest" in having the BIA resolve the timely-filed motion.[5] The Government, while blankly

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[5] The Government's assertion (at 50) that the "Board *did* resolve petitioner's motion" is of no moment. This non-merits rejec-

insisting (at 50) that such an interest cannot lie, offers no explanation as to why arbitrary deprivation of the right of access to adjudicative proceedings provided by law does not suffice to raise a due process concern. Pet. Br. 42-46.[6]

The Government's only defense of the equal protection concerns arising from its construction is that Petitioner's own equal protection rights were not violated. Gov't Br. 50-51. This argument is misplaced:

> [W]hen deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional problems pertain to the particular litigant[.]

Clark v. *Martinez*, 543 U.S. 371, 380-381 (2005). The Government offers no rational basis for the arbitrary treatment of aliens who timely file motions to reopen—even among those who file on the same day—that results from the Government's construction, under which

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tion based on the expiration of the voluntary departure period while the motion was pending does not satisfy due process. In *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 426-427 (1982), Logan's claim was similarly "resolved"—rejected because the commission had failed to meet certain procedural requirements.

[6] The Government properly recognizes (at 50) that Petitioner is not asserting a liberty or property interest in the grant of a motion to reopen. Rather, Petitioner's liberty interest is in remaining in this country, an interest protected by the motion to reopen. And his property interest is in the motion to reopen itself. The Government's suggestion (*id.*) that Petitioner cannot have a protected interest in a discretionary benefit conflates this distinction and is misplaced. *See* Pet. Br. 44 & n.34.

only some motions will be decided in time. *See* Pet. Br. 46-47.

* * *

This Court should therefore read the provisions together as a coherent whole, and preserve a voluntary departure recipient's ability to seek reopening. A construction, such as the Government's, that eliminates this right for this favored group of aliens would be inconsistent with the statute.

II. Tolling Preserves A Voluntary Departure Recipient's Right To A Motion to Reopen And Is Consistent With The Statutory And Regulatory Scheme

Tolling the voluntary departure period while a motion to reopen is pending harmonizes the statutory provisions. Although the Government contends (at 21) that a tolling rule would be "extraordinary," the Department of Justice itself proposed tolling as one solution in 1997. *See* 62 Fed. Reg. at 10,325-10,326. In addition, four courts of appeals have agreed that tolling is appropriate. *See* Pet. Br. 9 (citing cases). And of the three courts that concluded that tolling does not apply, there were two dissenting opinions in favor of a tolling rule. *Id.*

In rejecting tolling, the Government cites three regulations and this Court's decision in *Stone*. None speaks to Petitioner's request that the voluntary departure period be tolled during the pendency of a motion to reopen, and then restarted once the agency issues a final decision.

A. The Agency's Regulations Do Not Speak To Tolling

The Government repeatedly invokes three regulations to argue that the regulatory scheme precludes

tolling. *See* Gov't Br. 10, 11, 19, 21, 31, 34, 40. The Government's insistence that these regulations provide the dispositive answer on tolling ignores the fact that all three were promulgated or revised as part of the same 1997 interim rule in which the Department suggested tolling. 62 Fed. Reg. at 10,325-10,326, 10,331, 10,372-10,373. Given that the wording of these regulations has remained virtually unchanged to this day, these same regulations cannot now preclude a tolling solution. Indeed, these regulations plainly do not speak to tolling the departure period.

1. *Extension Regulation Does Not Apply.* The Government argues (at 15, 21-22, 24) that Petitioner is seeking an impermissible "extension" of his voluntary departure period. *See* 8 C.F.R. § 1240.26(f). However, tolling, by its nature, does not extend the voluntary departure period but merely preserves the number of days in the period while the agency deliberates on an alien's motion to reopen.[7] The distinction between tolling and extensions is reflected in this Court's own certiorari practice, where a motion for rehearing filed with the court of appeals "*toll*[s] the start of the period in which a petition for certiorari must be sought," notwithstanding the fact that the deadline is "mandatory and jurisdictional" and this Court has "no authority to *extend* the period for filing except as Congress per-

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[7] *See American Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538, 556 (1974) (permitting tolling of statute of limitations notwithstanding petitioners' argument that "federal courts are powerless to extend the limitation period beyond the period set by Congress"); *see also Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 473 n.2 (1975) (Marshall, J., concurring in part and dissenting in part) (noting "the common understanding that tolling entails a suspension rather than an extension of a period of limitations").

mits." *Missouri* v. *Jenkins* 495 U.S. 33, 45 (1990) (emphasis added).

2. *Reinstatement Regulation Does Not Apply.* The Government also suggests (at 44) that the agency's regulation limiting the "reinstatement" of voluntary departure in certain circumstances, 8 C.F.R. § 1240.26(h), precludes tolling. But Petitioner is not asking for a reinstatement of a departure period, but a suspension of the period while his motion is pending. Moreover, on its face, the regulation applies only to cases in which the BIA "grants" a motion to reopen during the voluntary departure window, and empowers the agency to give those aliens an entirely new departure period, up to the statutory maximum. By saying nothing about those motions left undecided during the voluntary departure window, the regulation is consistent with Petitioner's more modest request to suspend the departure clock while the agency considers his motion.

3. *"Stay of Deportation" Regulation Does Not Apply.* Finally, the Government argues (at 34, 40, 44) that 8 C.F.R. § 1003.2(f), entitled "Stay of deportation," is inconsistent with tolling the voluntary departure period. The title alone demonstrates the regulation's inapplicability. As the Government observes (at 34), the regulation provides that a motion to reopen does not "stay the *forced removal*"—deportation—"of an alien while that motion is being considered." (Emphasis in original.) Here, however, a deportation order is not being stayed because there was no such order in effect. *See* 8 U.S.C. § 1101(a)(47) (defining "order of deportation").

As the regulations specify, a final order of deportation does not become effective until after an alien overstays the voluntary departure period. Under the regu-

lations, an immigration judge who grants voluntary departure "shall also enter an *alternate* order o[f] removal." 8 C.F.R. § 1240.26(d) (emphasis added). Assuming the alien abides by certain conditions, this alternate order remains inactive during the voluntary departure period and only "become[s] final" upon the "overstay of any voluntary departure period granted or reinstated by the Board or the Attorney General." *Id.* § 1241.1(f); Gov't Br. 6.[8] Thus, the stay regulation does not apply for the simple reason that it pertains to final orders of deportation—which are distinct from a voluntary departure order, and which do not go into effect until after an alien overstays the voluntary departure period.[9]

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[8] *See also* 8 C.F.R. § 1241.7 (alien who departs "before the expiration of the voluntary departure period granted in connection with an alternate order of deportation or removal shall not be considered to be ... deported or removed"); *id.* § 1240.26(c)(3) (if alien fails to post required bond, "the voluntary departure order shall vacate automatically and the alternate order of removal *will take effect* on the following day" (emphasis added)).

[9] The Government's citation (at 7-8) to 8 U.S.C. § 1229c(f) is also inapposite. That provision states that no "court [shall] order a stay of an alien's removal pending consideration of any claim with respect to voluntary departure." 8 U.S.C. § 1229c(f). As the provision speaks only to court-ordered stays of removal while an alien's case is on petition for review, it has no bearing on the tolling of a voluntary departure period during the pendency of a motion to reopen before the BIA.

The Government also states that, under its reading of the statutory scheme, a court of appeals lacks authority to stay a voluntary departure period pending review. As the Government concedes, however, eight of the nine courts of appeals to have considered this question have rejected the Government's view. Gov't Br. 35-36 & n.15. The Government further argues (at 36) that none of the courts of appeals has concluded that filing a petition for review

B. *Stone* Does Not Preclude Tolling

The Government (at 38-40) also relies heavily on this Court's decision in *Stone* v. *INS*, 514 U.S. 386 (1995), to argue for a no-tolling rule. But, as the Government admits (at 38), *Stone* was a limited exception to the "normal tolling rule," 514 U.S. at 398, *i.e.*, that motions to reopen or reconsider toll the time for seeking judicial review. *Id.* at 397-398; *see also* Pet. Br. 34-38. In *Stone*, the Court focused its analysis on a particular statutory provision in the INA and found that Congress intended to craft an "explicit exception" to the tolling rule in the "particular context" at issue in that case. 514 U.S. at 397-398.

Moreover, *Stone* involved a jurisdictional deadline, which, like other jurisdictional provisions, "must be construed with strict fidelity to [its] terms." 514 U.S. at 405. By contrast, no such jurisdictional time bar is implicated by Petitioner's tolling request. And *Stone* involved a final order of deportation, raising the question whether a motion to reopen can render a final order "nonfinal"; a voluntary departure grant, however, is not a final order of deportation, and the alternate order of deportation does not take effect until *after* an alien overstays the voluntary departure period. 8 C.F.R. § 1241.1(f); *see also* Pet. Br. 36-37.

To the extent that *Stone* bears on the tolling question in Petitioner's case, however, one of the rationales

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"*automatically* triggers such a stay." Yet there is one fundamental distinction between petitions for review and motions to reopen: an alien may pursue a petition for review from abroad, *see* Pet. Br. 28 n.19, but, once an alien leaves the country, a motion to reopen is deemed withdrawn, 8 C.F.R. § 1003.2(d). Thus, an automatic stay is not required to preserve an alien's ability to pursue a petition for review.

of the decision supports tolling. As in *Stone*, the Court should adopt a construction that would not force aliens to make a "Hobson's choice." 514 U.S. at 398-399 ("This choice is one Congress might not have wished to impose on the alien."); *see also* Pet. Br. 21-22.[10]

III. The Department Of Justice's Proposed Rule Provides An Alternative To Tolling That Undercuts The Government's Arguments And Offers The Court Another Possible Construction Of The Statute

The Department's proposed rule, which implicitly acknowledges the need to reconcile the two statutory provisions, reinforces many of Petitioner's arguments. Unlike the Government's construction, but like a tolling rule, the solution offered by the proposed rule safeguards motions to reopen for aliens granted voluntary departure. The proposed rule thus provides the Court with an alternative interpretation to tolling—one similarly consistent with the statute—that could be used to resolve this case.

A. The Proposed Rule Reveals The Shortcomings In The Government's Arguments

After neglecting to take a position on the issue for more than a decade, the Department of Justice proposed regulations last month to address the interaction

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[10] The Government spends several pages (at 20-23) refuting an argument for traditional "equitable tolling." As explained in Petitioner's Brief (at 37 n.30, 49), even if this case does not fall squarely under this Court's equitable tolling jurisprudence, this Court has drawn on equitable tolling principles to adopt a uniform tolling rule to solve a statutory incongruity that had produced a "loophole." *Young* v. *United States*, 535 U.S. 43, 46-47, 50-51 (2002); *cf. American Pipe*, 414 U.S. at 554; *Burnett* v. *New York Cent. R.R. Co.*, 380 U.S. 424, 434-436 (1965).

of the two statutory provisions. 72 Fed. Reg. at 67,679. The proposed rule harmonizes the two provisions and proposes a solution going forward. Several features of this proposal demonstrate the problems with the Government's analysis of the statute.

The Department proposed that "permission to depart voluntarily ... will terminate if the alien files a motion to reopen or reconsider the final administrative order." 72 Fed. Reg. at 67,679. As a result, an alien who had previously been granted voluntary departure would be able to file a motion to reopen and, like other aliens, await a ruling on that motion. The Department explained that its proposed rule is "intended to allow an opportunity for aliens who have been granted voluntary departure to be able to pursue administrative motions [including motions to reopen] without risking the imposition of the voluntary departure penalties." *Id.*

This proposal calls into question many of the Government's arguments. *First*, the proposed rule, like the tolling rule, seeks to protect an alien's "opportunity ... to pursue administrative motions" after a grant of voluntary departure. 72 Fed. Reg. at 67,679. Thus, the Department apparently rejects the Government's view that Congress intended that the voluntary departure bargain requires the forfeiture of motions to reopen.

Second, the proposed rule reflects the important role of motions to reopen, including for those aliens who have accepted voluntary departure. It "recognizes that although an alien may request voluntary departure in good faith before an immigration judge, the alien's circumstances may change while an appeal is pending before the Board." 72 Fed. Reg. at 67,679. As a result, the proposal "ensures that the alien is not subsequently penalized when such change in circumstances occurs" and permits the alien to await a ruling on his motion to

reopen. *Id.*; *see also id.* (listing examples of relevant new facts that could develop).[11]

Third, under the proposed rule, a voluntary departure grant would "automatically terminate[]" once an alien filed a motion to reopen. 72 Fed. Reg. at 67,679, 67,682, 67,683. Notwithstanding the fact that the Government strenuously objects to a rule that would turn on an alien's "*unilateral* act" (at 18 (emphasis in original); *see also, e.g., id.* 21, 22, 24, 33, 46-47, 49), the proposed rule does exactly that.

Fourth, the Department reaffirms that an alien who accepts voluntary departure at the conclusion of proceedings is *not* required to waive appeals. *E.g.*, 72 Fed. Reg. at 67,676 ("[u]nder the current regulations, as well as under [the] proposed rule," such an alien "is still able to file an appeal to the Board and present any arguments with respect to the merits of the alien's removability and eligibility for any form of relief or protection from removal"); *id.* at 67,678.[12]

Fifth, the proposed rule essentially eliminates the Government's concern (at 18) that a tolling rule would "invite strategic behavior by aliens seeking to extend their unlawful stay in the United States as long as pos-

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[11] The Department also explained that notwithstanding this Court's earlier view that motions to reopen are disfavored, Congress has since "provided that aliens may file a motion to reopen or motion to reconsider." 72 Fed. Reg. at 67,679.

[12] The proposal also recognizes the importance of notifying aliens of the consequences of accepting voluntary departure. *See* 72 Fed. Reg. at 67,682 ("To ensure that aliens are aware of the consequences of filing a motion to reopen or reconsider prior to the expiration of voluntary departure, ... the alien will be advised that an order of voluntary departure shall be automatically terminated upon filing a motion to reopen or reconsider[.]").

sible." Such concerns, overstated even before the proposed rule,[13] are eliminated in the future: If the Department's proposed rule goes into effect in anything close to its current form, a decision by this Court permitting tolling will affect cases *already* in the pipeline and will not create any risks going forward.

B. The Solution Provided In The Proposed Rule Offers An Alternative Means To Resolve This Case

Tolling and the solution provided for in the proposed rule are alternative interpretations of the statute that harmonize the provisions in a way so as not to eliminate the motion to reopen for aliens granted voluntary departure. Both interpretations thus avoid the untenable reading that the Government sets forth in its brief.

Even if this Court does not adopt a tolling rule, it should reject the Government's construction of the statute. Instead, this Court can interpret the statute consistent with the solution in the proposed rule: to permit an alien granted voluntary departure to withdraw the voluntary departure request and instead be subject to a final order of removal. Such an alien would be placed in the same position as other aliens (such as criminal aliens and others who are not eligible for voluntary departure) and could await a ruling on his motion to reopen without being subject to additional penalties.

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[13] *See* Part I.C.1 *supra* (noting that Attorney General found "no pattern of abuse" before 1996 and that Congress defined the contours of the right in 1996); *see also* Part I.B.2 *supra* (noting adjudication periods for motions to reopen).

Petitioner agrees with the Government that the solution in the proposed rule reflects a permissible construction of the statute. *See* 72 Fed. Reg. at 67,679 ("[t]he voluntary departure statute does not unambiguously provide that permission to depart voluntarily is irrevocable once granted"). Indeed, Petitioner actually requested this relief.[14]

Notwithstanding that the prospective proposed rule is not binding in the instant case, the Court may consider the Department's solution and interpret the statute consistent with it. *Cf. Wisconsin Dep't of Health & Family Servs.* v. *Blumer*, 534 U.S. 473, 496-497 (2002) (adopting interpretation that was consistent with agency's "recently proposed rule"). Accordingly, if this Court declines to adopt a tolling rule, it should deem Petitioner's voluntary departure grant withdrawn, such that he would be subject to a final order of removal instead.

IV. There Is No Agency Position On Tolling That Warrants Deference

On the question of tolling, the Government offers an inchoate claim to administrative deference, apparently pursuant to the principles of *Chevron U.S.A. Inc.*

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[14] Petitioner raised this issue at every stage of the proceeding. C.A. App. 9-10, Pet. App. 3 (seeking to withdraw voluntary departure request, and instead be subject to a final order of removal, when filing motion to reopen with the BIA); Pet. App. 2 (Fifth Circuit); Pet. 15; Pet. Br. 50 ("In the alternative, Petitioner should be permitted to withdraw his request for voluntary departure and, instead, be subject to a final order of removal.").

The proposed rule would not require that an alien specifically request such relief (as Petitioner did); rather, the voluntary departure grant would terminate automatically. *See, e.g.*, 72 Fed. Reg. at 67,679.

v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See, e.g.*, Gov't Br. 41 (referencing *Chevron* deference). These arguments for deference are unavailing; there is no agency view on tolling to which the Court must defer.

As an initial matter, the Government's invocation of *Chevron* seems dubious. It offers *Chevron* deference as a fallback argument—but where such deference applies, it is because "*Chevron* deference [is] owed to administrative practice in applying a statute" because "Congress delegated authority to the agency." *United States* v. *Mead Corp.*, 533 U.S. 218, 226 (2001). Accordingly, parties seeking such deference generally center their case around the *Chevron* framework. And yet, the Government did not mention deference of any sort in its briefs below, and only now invokes *Chevron* on page 41 of its brief as a peripheral argument it views as "not necessary" to resolve the case. Gov't Br. 40-41. Nor has the Government consistently invoked *Chevron* in other cases raising the tolling issue, even arguing that the tolling question should be "reviewed *de novo*." Resp. Br. 13, *Dekoladenu* v. *Gonzales*, Nos. 04-2164 & 05-1737 (4th Cir. Sept. 19, 2005).[15]

The Government's apparent hesitance regarding *Chevron* is sensible; there is no authoritative agency view on the tolling question to which the Court might defer. The Government concedes (at 43) that there is no precedential BIA decision addressing the question in this case. And none of the bases identified by the Gov-

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[15] *See also* Resp. Br., *Azarte* v. *Ashcroft*, No. 02-73947 (9th Cir. Dec. 1, 2003) (no reference to deference); Resp. Br., *Ugokwe* v. *U.S. Attorney General*, No. 05-15237 (11th Cir. Dec. 19, 2005) (making no argument for deference to an agency interpretation).

ernment (at 40) for the purported "longstanding position" of the agency on tolling—not the pre-IIRIRA BIA decision in *Shaar*, not the 1997 regulations, and not the analysis of tolling in the preamble to the newly proposed rule—merits deference. But even if these positions did warrant deference, the Court ought to reject these views, as they constitute an unreasonable interpretation of the statute. *See* Part I *supra*.

A. The BIA's Decision In *Shaar* Does Not Warrant Deference

Addressing different statutory and regulatory provisions from those at issue in this case, the BIA determined, in a 7-5 decision, that the timely filing of a motion to reopen did not toll an alien's voluntary departure period. *Matter of Shaar*, 21 I. & N. Dec. 541, 546-549 (BIA 1996). Because it construes different statutory provisions, *Shaar* does not merit any deference in this case.

1. *Shaar* involved a different statutory scheme—the statute at issue here had not yet been enacted. Critically, the conflict between the statutory provisions on which Petitioner's arguments for tolling are based did not exist in *Shaar*. And, conversely, the key rationales that might justify the no-tolling rule in *Shaar* are absent under current law.

As the BIA mentioned, an alien who filed a motion to reopen during his voluntary departure period was not "without recourse" because he could seek an extension, the duration of which was not capped at that time. 21 I. & N. Dec. at 548 (citing 8 C.F.R. § 244.2 (1995)). The length of the voluntary departure periods themselves were likewise not constrained by statute. *See* 8 U.S.C. §§ 1252b(e)(2), 1254(e) (1994) (revised and recodified at 8 U.S.C. § 1229c in 1996). The unlimited base and extension periods for voluntary departure left

a longer window for the agency to resolve the motion to reopen. For example, Shaar himself had an eight-month voluntary departure period that was further extended by almost six months. 21 I. & N. Dec. at 542. Additionally, motions to reopen at that time were merely products of regulation receiving little or no protection. *See id.* at 547; *see also* 8 C.F.R. §§ 3.2, 3.8 (1994). And, the statute offered additional flexibility, providing for an exception to the applicable penalties for overstaying the voluntary departure period because of "exceptional circumstances." *See* 8 U.S.C. § 1252b(e)(2)(A) (1994) (repealed by IIRIRA in 1996).[16]

The changes effected by IIRIRA render *Shaar* irrelevant.[17] Even the First Circuit, which rejected tolling, emphasized that "[o]ur decision does not in any way turn on *Shaar*" and noted its "likely infirmity." *Chedad* v. *Gonzales*, 497 F.3d 57, 64 (1st Cir. 2007); *cf. Public Citizen, Inc.* v. *HHS*, 332 F.3d 654, 659 (D.C.

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[16] The substantial statutory changes and the lack of any evidence of Congress's awareness of *Shaar* eliminate any argument that Congress ratified *Shaar*. *See Bragdon* v. *Abbott*, 524 U.S. 624, 645 (1998) (finding ratification evident where legislation included "repetition of the same language" previously interpreted); *Brown* v. *Gardner*, 513 U.S. 115, 121 (1994) (where "there is no ... evidence to suggest that Congress was even aware of the [agency's] interpretive position[,] we consider ... re-enactment to be without significance" (internal quotation marks omitted)).

[17] *See Franklin* v. *Massachusetts*, 505 U.S. 788, 822 (1992) (Stevens, J., concurring in part and concurring in the judgment, joined by Blackmun, Kennedy, and Souter, JJ.) ("If the justification for [an agency's] decision no longer obtain[s], the refusal to reconsider would be quite capricious[]" because "[i]nertia cannot supply the necessary rationality" for an agency's ratification of prior policy in the face of changed circumstances (internal quotation marks omitted)).

Cir. 2003) (rejecting *Chevron* deference where the "only potentially relevant regulations ... were promulgated before [the relevant statute] was enacted").

2. The Government (at 43-44) seeks to reinvigorate *Shaar* by asserting that the BIA has "continued to apply the rule announced in *Shaar*." However, the Government concedes (at 43) that the BIA has not issued a "precedential" decision on the tolling question since *Shaar*. Instead, the Board has issued non-precedential decisions, such as the single-member decision in this case, that reject tolling in particular cases. Such decisions, however, do not change the fact that *Shaar* did not interpret the relevant statutory provisions. Nor do they warrant *Chevron* deference of their own accord. *Mead* made clear that *Chevron* deference is only due where Congress has delegated authority "to make rules carrying the force of law, and ... the agency interpretation claiming deference was promulgated in the exercise of that authority." 533 U.S. at 226-227. Non-precedential BIA decisions—including all single-member decisions and three-member decisions not designated precedential, *see* 8 C.F.R. § 1003.1(e)(6)(ii), (g)—are not promulgated "in the exercise" of the BIA's authority "to make rules carrying the force of law."

3. The Government's invocation of *Chevron* deference based on *Shaar* is particularly peculiar because it represents an about-face in its understanding of *Shaar* and the BIA's use of *Shaar*. In *Banda-Ortiz*, the first Fifth Circuit case to reject tolling, the Government argued that "the Board's decision in *Matter of Shaar* does not control the result in this case." Resp. Br. 20 n.7, *Banda-Ortiz* v. *Gonzales*, No. 04-61100 (5th Cir. May 9, 2005). And in its brief to the Third Circuit in *Kanivets*, in which Kanivets was arguing that *Shaar* was not controlling, the Government acknowledged

that "the Board said that *Matter of Shaar* does not control Kanivets' case because it involved a different statutory scheme." Resp. Br. 7, *Kanivets* v. *Gonzales*, Nos. 03-3569 & 03-4187 (3d Cir. Jan. 16, 2004).

B. The 1997 Regulations Provide No Basis For *Chevron* Deference

The Government argues (at 44) that the no-tolling rule "accords with the interim rule that the Attorney General promulgated to implement IIRIRA on March 6, 1997." Any argument for deference to this rule is misplaced because it expressly left open the tolling question. The Department had "considered several options [regarding the effect of a motion to reopen on a voluntary departure period], but *has not adopted any position* or modified the interim rule." 62 Fed. Reg. at 10,326 (emphasis added).[18] The Department promised to address this question in a "final rule." *Id.* Both the Department and the Government's Brief in Opposition acknowledge that "no final rule directly addressing those issues has been published." 72 Fed. Reg. at 67,677; *see also* Opp. 14-15 & n.5 (arguing that new regulations would soon resolve the question presented). This statement implicitly concedes that the 1997 regulations do not resolve the tolling question.

C. The Analysis Of The Tolling Question In The Preamble To The Newly Proposed Rule Does Not Warrant *Chevron* Deference

The Government (at 48) seizes on the discussion of tolling in the newly "proposed rule's introductory text" and suggests that this discussion warrants *Chevron*

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[18] By declining to "adopt[] any position," 62 Fed. Reg. at 10,326, the rules plainly did not take any position on *Shaar*.

deference. The sole authority the Government cites for deference to a proposed rule preamble is *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735 (1996). Nothing in *Smiley*, however, supports *Chevron* deference for a proposed rule, much less a preamble to a proposed rule.

When *Smiley* noted that the Court should not "ignore the agency's current authoritative pronouncement of what the statute means," it was referring to "a full-dress regulation, issued by the Comptroller himself and adopted pursuant to the notice-and-comment procedures of the Administrative Procedure Act designed to assure due deliberation." 517 U.S. at 741, 744 n.3. Analysis in a proposed rule's preamble is in every pertinent way not an "authoritative pronouncement"—it does not have the force of law, has not been subject to a deliberative process such as notice and comment, and is subject to revision, or rejection, by the agency.

Indeed, this Court has never deferred to a preamble in a proposed rule. Under *Mead*, the nascent status of this sort of agency view precludes *Chevron* deference, which is due only when Congress has delegated authority "to make rules carrying the force of law, and ... the agency interpretation claiming deference was promulgated in the exercise of that authority." *Mead*, 533 U.S. at 226-227. Unlike the final rule in *Smiley*, neither the preamble to a proposed rule nor the proposal itself carries the force of law. *See Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 845 (1986) ("It goes without saying that a proposed regulation does not represent an agency's considered interpretation of its statute and that an agency is entitled to consider alternative interpretations before settling on the view it considers most sound.").

Accordingly, the purported "longstanding practice" of the BIA does not warrant *Chevron* deference based

on *Shaar*, the 1997 regulations, or the preamble to the proposed rule.[19]

CONCLUSION

The judgment of the Fifth Circuit should be reversed.

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[19] Even *Skidmore* deference has limited relevance to the tolling question here and is not expressly sought by the Government. Under *Skidmore*, a court "follow[s] an agency's rule only to the extent it is persuasive." *Gonzales* v. *Oregon*, 546 U.S. 243, 269 (2006). For the reasons explained in Part I, *supra*, however, a no-tolling rule, like any rule that does not permit the voluntary departure and motion to reopen provisions to coexist, is contrary to the language of the statute. Indeed, for the same reason, even if *Chevron* deference were to apply, the agency's construction would fail as an unreasonable interpretation of the statute.

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IN THE

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SAMSON TAIWO DADA,

Petitioner,

v.

PETER D. KEISLER,
ACTING ATTORNEY GENERAL,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the filing of a motion to reopen removal proceedings automatically tolls the period within which an alien must depart the United States under an order granting voluntary departure.

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IN THE

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Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1) is unreported, but is available at 2006 WL 3420124. The decision of the Board of Immigration Appeals denying Petitioner's Motion to Reopen and Reconsider (*id.* 3-4), the decision of the Board affirming the immigration judge's decision (*id.* 5-6), and the decision of the immigration judge (*id.* 7-9) are also unreported.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The judgment of the court of appeals was entered on November 28, 2006. The petition for a writ of certiorari was filed on February 26, 2007 and granted on September 25, 2007.

STATUTES AND REGULATIONS INVOLVED

The following statutory and regulatory provisions are set forth in relevant part in the petition:

a. 8 U.S.C. § 1229a(c)(7) (Pet. 2);

b. 8 U.S.C. § 1229c(b) (Pet. 3);

c. 8 C.F.R. § 1003.2(d) (Pet. 5).

INTRODUCTION AND STATEMENT OF THE CASE

As part of its amendments to the Immigration and Nationality Act (INA) in 1996, Congress codified an alien's right to file a motion to reopen removal proceedings. 8 U.S.C. § 1229a(c)(7). Congress in 1996 also established new eligibility criteria and time periods for "voluntary departure," which is a form of discretionary relief that allows a favored class of aliens "voluntarily to depart the United States" as an alternative to removal. *Id.* § 1229c(a)(1), (b)(1).

This case raises an important question about the intersection of these two provisions, namely, whether the timely filing of a motion to reopen under 8 U.S.C. § 1229a(c)(7) tolls the period of voluntary departure under 8 U.S.C. § 1229c. Without tolling, aliens granted voluntary departure are effectively denied their statutory right to seek reopening. The alien must remain in the country and hope that the immigration official resolves his motion in time. If he leaves, his motion is deemed withdrawn. If he stays and the motion is unresolved, as is so often the case, he faces penalties including ineligibility for reopening.

A. The Statutes And Regulations Governing Motions To Reopen And Voluntary Departure

1. Motions To Reopen

For more than 90 years, motions to reopen have been a part of deportation proceedings. 23 Fed. Reg. 9,115, 9,118-9,119 (Nov. 26, 1958) (promulgating 8

C.F.R. §§ 3.2, 3.8 (motions to reopen and for reconsideration)); *see also, e.g.*, *Chew Hoy Quong* v. *White*, 244 F. 749, 750 (9th Cir. 1917); *Ex parte Chan Shee*, 236 F. 579, 580 (N.D. Cal. 1916). In 1996, as part of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Congress first codified an alien's right to a motion to reopen. Pub. L. No. 104-208, div. C, § 304(a)(3), 110 Stat. 3009-546, 3009-593 (1996) (codified at 8 U.S.C. § 1229a(c)(7)).

Before enacting this provision, Congress considered the issue for a number of years. As of 1990, the regulations governing motions to reopen did not have any time limits or limits on the number of motions an alien could file. *See* 8 C.F.R. § 3.2 (1989). In 1990, Congress instructed the Attorney General to conduct a study on perceived abuses associated with aliens' failure to consolidate their requests for relief and to issue regulations specifying the maximum time period for filing motions to reopen. *See* Immigration Act of 1990, Pub. L. No. 101-649, § 545(c), (d), 104 Stat. 4978, 5065-5066.[1]

The Attorney General's report found "no pattern of abuse" with respect to aliens failing to consolidate their requests, noting that the total number of motions to reopen was "relatively low" and the majority of requests for relief were appropriately "based upon an allegation of new facts," as required by the regulations then in place. *Attorney General's Report to Congress on Con-*

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[1] Around the same time, this Court expressed similar concerns. *See, e.g.*, *INS* v. *Doherty*, 502 U.S. 314, 322-323 (1992) (involving pre-1990 motion to reopen) (noting that "[t]here is no statutory provision for reopening of a deportation proceeding" and expressing concerns about possible abuse); *INS* v. *Rios-Pineda*, 471 U.S. 444, 446, 450 (1985).

solidation of Requests for Relief from Deportation 6-7 (1991); *see also* 68 Interpreter Releases 907, 908 (July 22, 1991).

With respect to setting time periods for motions to reopen, Congress directed that, "[u]nless the Attorney General finds reasonable evidence to the contrary, the regulations should state that such motions be made within 20 days of the date of the final determination in the proceeding and that such motions be limited to one motion to reopen and one motion to reconsider." H.R. Conf. Rep. No. 101-955, at 133 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 6784, 6798. The Department of Justice initially proposed a 20-day time period for motions to reopen, *see* 59 Fed. Reg. 29,386, 29,388 (June 7, 1994), but ultimately decided on a final regulation with a 90-day time period, *see* 61 Fed. Reg. 18,900, 18,905 (Apr. 29, 1996); *see also id.* 18,902. The Department explained that the limitation of one motion to reopen per alien combined with the larger 90-day period struck the proper balance, for it "reflect[ed] the congressional intent to streamline the deportation process, while providing a reasonable opportunity for meritorious cases to be heard." 60 Fed. Reg. 24,573, 24,574 (May 9, 1995).

When codifying motions to reopen, Congress adopted the 90-day time period. IIRIRA, § 304(a)(3), 110 Stat. at 3009-593 (codified at 8 U.S.C. § 1229a(c)(7)(C)(i)). An alien is now entitled by statute to file one motion to reopen. 8 U.S.C. § 1229a(c)(7).[2]

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[2] Similarly, in 1996, Congress also codified an alien's right to file one motion to reconsider a decision that the alien is removable. IIRIRA, § 304(a)(3), 110 Stat. at 3009-593 (codified at 8 U.S.C. § 1229a(c)(6)(A)). That right too had previously existed by regulation. *See* 23 Fed. Reg. at 9,118; 8 C.F.R. § 3.2 (1994) (motions to reopen and for reconsideration).

The motion to reopen must state new facts that the alien seeks to establish at a hearing and must be supported by evidentiary material. *Id.* § 1229a(c)(7)(B); *see also* 8 C.F.R. § 1003.2(c)(1). Approximately 10,000 motions to reopen are filed with the Board of Immigration Appeals (BIA) each year. DOJ Executive Office for Immigration Review, *FY 2006 Statistical Year Book* T2 (2007), *available at* http://www.usdoj.gov/eoir/statspub/fy06syb.pdf (9,256 such motions filed in fiscal year 2006). Consistent with "long-standing" practice, a motion to reopen is generally assigned to the member(s) of the Board who decided the original appeal. 67 Fed. Reg. 54,878, 54,887 (Aug. 26, 2002); *see also* 8 C.F.R. § 1003.1(e)(5). "This permits some familiarity with the record and obviates the use of such a motion to merely seek a second panel review of a decision." 67 Fed. Reg. at 54,887.

2. Voluntary Departure

Voluntary departure is a form of discretionary relief available to a favored class of aliens. It permits an alien who has satisfied a number of criteria to leave voluntarily, thereby granting certain benefits to the alien (such as the ability to put his affairs in order) and saving the Government the resources and expenses associated with effectuating a forcible removal.

All categories of aliens facing removal, including lawful permanent residents, are eligible to seek voluntary departure, but certain statutory and non-statutory criteria must be met. For example, an alien who has been convicted of an aggravated felony is barred from receiving voluntary departure. *See* 8 U.S.C. § 1229c(a)(1), (b)(1)(C). Aliens being deported on terrorism grounds are also ineligible for voluntary departure. *See id.*

Under the statutory scheme put in place in 1996, the eligibility criteria depend on whether an alien seeks voluntary departure (1) in lieu of or before the conclusion of removal proceedings, 8 U.S.C. § 1229c(a), or (2) at the conclusion of removal proceedings, *id.* § 1229c(b).[3] These two categories differ in the availability of appeals, the requirements that must be satisfied, and the number of days available for voluntary departure.

Only aliens seeking voluntary departure during or before the completion of proceedings need to waive their appeals. This is required not by statute but by regulation; such aliens must concede removability, make no additional requests for relief, and waive appeal of all issues. *See* 62 Fed. Reg. 10,312, 10,372 (Mar. 6, 1997); 8 C.F.R. § 1240.26(b)(1)(i)(B)-(D).

Aliens seeking voluntary departure at the conclusion of proceedings are not required by statute or regulation to waive appeals; for such aliens the receipt of a grant of voluntary departure is not conditioned on the waiver of a right to administrative and judicial review. Thus, an alien seeking relief from an immigration judge, such as asylum or adjustment of status,[4] but who

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[3] Before IIRIRA, the voluntary departure statutory provisions did not differentiate between requests before and after the completion of removal proceedings. *See* 8 U.S.C. §§ 1252(b), 1252(g), 1252b(e)(2), 1254(e) (1994).

[4] Aliens may seek various forms of relief from the immigration judge. For aliens who are not lawful permanent residents, such relief includes: asylum, 8 U.S.C. § 1158; withholding of removal, *id.* § 1231(b)(3); cancellation of removal, *id.* § 1229b(b); adjustment of status, *id.* § 1255; or temporary protected status, *id.* § 1254a. For legal permanent residents facing removal, possible grounds for relief include: cancellation of removal, *id.* § 1229b(a); waiver of deportation, 8 U.S.C. § 1182(c) (1994) (repealed 1996), *see INS* v. *St. Cyr*, 533 U.S. 289, 294-297 (2001); a record of lawful ad-

is denied that relief is not required to waive future appeals in exchange for voluntary departure. The alien can accept voluntary departure at the conclusion of proceedings and continue to press his administrative and judicial appeals on the underlying relief.

These aliens, though they retain rights to appeal, both must meet requirements not applicable to the aliens seeking voluntary departure in lieu of or before the completion of proceedings, and face shorter voluntary departure periods. Specifically, an alien seeking voluntary departure after proceedings must prove, *inter alia*, that he is and has been of "good moral character" for the previous five years. 8 U.S.C. § 1229c(b)(1)(B). Aliens seeking voluntary departure after the conclusion of proceedings may receive a period of voluntary departure up to 60 days, while those seeking voluntary departure in lieu of or before the conclusion of proceedings have up to 120 days. *Id.* § 1229c(a)(2)(A), (b)(2).

For both categories of voluntary departure recipients, an overstay of the voluntary departure period gives rise to two penalties: a mandatory civil fine of between $1,000 and $5,000, 8 U.S.C. § 1229c(d)(1)(A), and ineligibility for a period of ten years from obtaining another grant of voluntary departure, cancellation of removal, adjustment of status, change of nonimmigrant classification, or a record of lawful admission, *id.* § 1229c(d)(1)(B). The statute mandates that an order permitting voluntary departure "shall inform the alien of the penalties" of overstaying the applicable departure period. *Id.* § 1229c(d)(3).

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mission, 8 U.S.C. § 1259; waiver of inadmissibility, *id.* § 1182(h), (i); or waiver of inadmissibility, *id.* § 1227(a)(1)(H).

3. The Intersection Of The Statutes And Regulations

This case concerns the intersection of these provisions governing motions to reopen and voluntary departure. Specifically, the question is whether the voluntary departure period is tolled pending a motion to reopen. This question has important ramifications because it affects the availability of motions to reopen for this favored class of aliens.

If the voluntary departure period is tolled, the alien can file a motion to reopen and await a ruling. If the voluntary departure period is not tolled, however, the alien is effectively denied a decision on a motion to reopen. The alien cannot leave while he awaits a decision on the motion, because if he departs then his motion to reopen will be deemed withdrawn. 8 C.F.R. § 1003.2(d). He also cannot forgo voluntary departure by accepting a deportation order (as Petitioner unsuccessfully attempted to do in this case). Pet. App. 3-4. His only option is to remain and hope that the immigration official resolves his motion before the expiration of the voluntary departure period. But if the official does not resolve it within this timeframe, as occurs regularly, the alien will not only likely be ineligible for reopening, but will also face other penalties. *See* 8 U.S.C. § 1229c(d)(1).

After the passage of IIRIRA, the Department of Justice acknowledged the questions arising from the interaction of these provisions and suggested three possible constructions of the statute. Two of these proposals would have permitted some form of tolling. 62 Fed. Reg. at 10,325-10,326 (suggesting the possibility that the motion tolls any period during which the motion is pending, or the voluntary departure period runs for a fixed period of time following disposition of any

such motion). The Department did not issue regulations that address the tolling question.

Seven courts of appeals have since considered the tolling question. Four circuits have adopted a tolling rule, and three have rejected it. *Compare Ugokwe* v. *U.S. Attorney General*, 453 F.3d 1325 (11th Cir. 2006); *Kanivets* v. *Gonzales*, 424 F.3d 330 (3d Cir. 2005); *Sidikhouya* v. *Gonzales*, 407 F.3d 950 (8th Cir. 2005); *Azarte* v. *Ashcroft*, 394 F.3d 1278 (9th Cir. 2005) *with Chedad* v. *Gonzales*, 497 F.3d 57 (1st Cir. 2007); *Dekoladenu* v. *Gonzales*, 459 F.3d 500 (4th Cir. 2006), *petition for cert. filed* (U.S. Mar. 22, 2007) (No. 06-1285); *Banda-Ortiz* v. *Gonzales*, 445 F.3d 387 (5th Cir. 2006), *cert. denied*, 127 S. Ct. 1874 (2007). In the three cases that held that tolling does not apply, there were two dissenting opinions, *Chedad*, 497 F.3d at 66 (Lipez, J., dissenting); *Banda-Ortiz*, 445 F.3d at 391 (Smith, J., dissenting), and one concurring opinion that would have narrowed the majority's decision, *Dekoladenu*, 459 F.3d at 508 (Gregory, J., concurring).

B. Factual Background

Petitioner Samson Taiwo Dada is a native and citizen of Nigeria. Pet. App. 1, 7. In 1998, he entered the United States legally on a nonimmigrant visa, which he overstayed. *Id.* 7. He subsequently married an American citizen, who filed a Petition for Alien Relative, Form I-130, on Dada's behalf, seeking to adjust his immigration status. *Id.* 8. Because former counsel had neglected to provide all of the documentary evidence requested by the Bureau of Citizenship and Immigration Services, however, the I-130 petition was denied. *Id.*

In 2004, the Government initiated removal proceedings against Dada, charging him with having remained in the United States for a time longer than permitted, in violation of Section 237(a)(1)(B) of the INA. Pet. App. 7-

8. At his removal proceeding, Dada, through counsel, requested a continuance so that a newly filed I-130 could be adjudicated, and he sought voluntary departure in the alternative. *Id.* 7-9. The presiding immigration judge denied Dada's continuance request because she could not "justify to [her] boss" keeping the case on her docket while the I-130 petition was processed. C.A. App. 164; *see also* Pet. App. 8. The judge exercised her discretion to grant Dada voluntary departure, and granted a 60-day voluntary departure period. Pet. App. 9; *see also* C.A. App. 166. The immigration judge asked whether Petitioner "reserve[d] appeal," and Petitioner's counsel confirmed that he did. C.A. App. 167 ("Q. And you reserve appeal? A. Yes, Your Honor.").

In November 2005, the BIA affirmed the immigration judge's decision without opinion in a per curiam order and reinstated the voluntary departure period for 30 days. Pet. App. 5-6.

Before the expiration of this 30-day period, and within the time allowed to file, Dada filed in the BIA a motion to reopen and to reconsider his removal proceedings. *See* Pet. App. 3. At the time Dada filed his motion, the courts of appeals to have considered the question had unanimously concluded that a timely-filed motion to reopen tolls the period of voluntary departure. *See Kanivets*, 424 F.3d 330; *Sidikhouya*, 407 F.3d 950; *Azarte*, 394 F.3d 1278.

In addition, Dada sought to withdraw his request for voluntary departure and accept an order of deportation (*i.e.*, to waive the benefits of voluntary departure). Pet. App. 3. He also asked the BIA to stay his removal pending resolution of his motion to reopen. *Id.*

Approximately two months later, the BIA denied Dada's motion in a non-precedential one-member per curiam order. Pet. App. 3-4. Without acknowledging

the tolling question or addressing the merits of Dada's arguments, the BIA rejected the motion on the ground that Dada's overstay of the voluntary departure period rendered him ineligible by statute for adjustment of status. *Id.* The Board did not address Dada's request to withdraw the grant of voluntary departure. *Id.*

Dada petitioned for review in the Fifth Circuit. While his petition was pending, that court, in a divided opinion, decided *Banda-Ortiz*, 445 F.3d 387, breaking with its sister circuits and holding that a timely-filed motion to reopen does not toll a period of voluntary departure. In light of *Banda-Ortiz*, the Fifth Circuit denied Dada's petition. Pet. App. 1-2.

SUMMARY OF ARGUMENT

Basic principles of statutory interpretation require the conclusion that a timely-filed motion to reopen under 8 U.S.C. § 1229a(c)(7) tolls a voluntary departure period granted under 8 U.S.C. § 1229c. This Court's precedents instruct that the statute must be read as a whole and construed so as not to eliminate an important statutory right for a class of aliens. This is especially so where, as here, the Government's construction would create a Hobson's choice for aliens and lead to arbitrary results.

Tolling is also consistent with the structure of the 1996 amendments and traditional tolling principles. In particular, the amendments did not require the waiver of administrative and judicial appeals as a condition of voluntary departure. In addition, absent tolling, the newly-codified right to seek reopening would be available to criminal aliens, but not to the favored subset of aliens eligible for voluntary departure. Finally, in a related context, this Court has tolled statutory deadlines pending consideration of a motion to reopen and should do the same here. *See* Part I *infra*.

The constitutional avoidance canon provides an additional reason to reject a no-tolling rule. In the absence of tolling, the ability to pursue a motion to reopen will depend entirely on arbitrary government action unrelated to the alien and out of his control. A subset of voluntary departure recipients will have their motions to reopen decided on their merits, while many will not, the result dependent entirely on how quickly a given immigration official acts on the motion. The result is a system in which arbitrary government action jeopardizes aliens' protected interests under the Due Process Clause and treats identically situated classes of aliens differently absent any rationale. Such a regime raises grave concerns under the Fifth Amendment. Given the availability of a plausible, even preferable, construction, the constitutional avoidance canon strongly militates toward tolling. *See* Part II *infra*.

Finally, at a minimum, the Court should permit tolling in this case. *See* Part III *infra*.

ARGUMENT

I. Under Basic Statutory Interpretation Principles And This Court's Precedents, A Timely Motion To Reopen Tolls The Voluntary Departure Period

A. This Court's Precedents Support A Construction That Preserves A Voluntary Departure Recipient's Right To A Motion To Reopen

Basic principles of statutory construction instruct that the provisions governing voluntary departure and motions to reopen must be read in harmony with each other and in light of the statute as a whole. Congress codified the right to file a motion to reopen for the benefit of all aliens, including the favored subset granted voluntary departure. Congress also provided that permission to depart voluntarily is valid for a

specified time period. In considering the interaction of the reopening provision with the voluntary departure provision, this Court cannot read one provision in isolation from the other.

Absent tolling, these two provisions create a trap for a voluntary departure recipient facing changed circumstances who files a motion to reopen. If he leaves the country in an attempt to comply with the voluntary departure order, his motion to reopen will be deemed withdrawn. If, on the other hand, he waits for the adjudication of his motion, he risks being penalized for overstaying the voluntary departure period, and will be in a worse situation than if he had never sought voluntary departure at all.

This Court's precedents demonstrate that the statute should be construed to preserve this important right to seek reopening for the class of aliens who are granted voluntary departure. This is all the more clear because voluntary departure recipients constitute a favored class of aliens, who, in many cases, must establish "good moral character." Additionally, this Court's precedents demonstrate that the statute should be construed to avoid the Hobson's choice and arbitrary results that would follow from the Government's construction.

1. Reading the statute as a whole requires tolling here

In interpreting statutory provisions, this Court "follow[s] the cardinal rule that a statute is to be read as a whole." *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (explaining that "the meaning of statutory language, plain or not, depends on context"); *see also Shell Oil Co.* v. *Iowa Dep't of Revenue*, 488 U.S. 19, 25 (1988) (noting that language should not be read "without reference to the statutory context"); *United States* v. *Morton*,

467 U.S. 822, 828 (1984) (this Court "read[s] statutes as a whole"); *United States* v. *Witkovich*, 353 U.S. 194, 199 (1957) (declining to read immigration provision "in isolation and literally" and instead looking to the "Act as a whole"). In doing so, the Court has sought to "harmonize" the various provisions of a statute. *See Witkovich*, 353 U.S. at 200; *see also Digital Equip. Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 879 (1994) (recognizing the "familiar principle of statutory construction that, when possible, courts should construe statutes ... to foster harmony with other statutory and constitutional law"). Without tolling, the voluntary departure provision would effectively nullify the statutory right to a motion to reopen for voluntary departure recipients.

In *Costello* v. *INS*, 376 U.S. 120 (1964), this Court considered a statutory interpretation question quite similar to the one presented here, also involving the interaction of immigration provisions. Reading the statute as a whole, the Court refused to adopt a construction that would have nullified an avenue of relief for an entire class of aliens.

Costello involved a statutory provision, Section 241(a)(4) of the INA, which permitted the deportation of "[a]ny alien ... who ... at any time after entry is convicted of two crimes involving moral turpitude." 376 U.S. at 121 (internal quotation marks omitted). The petitioner, who had previously become a naturalized citizen, was convicted of two separate offenses of tax evasion and subsequently denaturalized. *See id.* The question was whether the crimes committed while he was naturalized counted for purposes of the provision. *Id.*

First, the Court interpreted the deportation provision at issue. Two Justices and the court of appeals believed the plain language of the statute to be unambiguous, as Costello was an alien who committed the

crimes "at any time after entry." 376 U.S. at 133 (White, J., dissenting) ("Th[e] description of the deportable alien [in the statutory provision] fits Costello exactly and unambiguously."); *see also id.* at 122 (quoting court of appeals). The Court, however, disagreed that the provision was unambiguous. *Id.* at 124-125.

The Court emphasized that the Government's interpretation would result in Costello's being deported without the opportunity to apply for relief under another provision, which granted aliens the right to apply for a judicial recommendation against deportation at the time of conviction. 376 U.S. at 126-127. The Court stated that this second provision, which authorized nothing more than the opportunity to apply for discretionary relief, was "an important part of the legislative scheme." *Id.* at 127 (internal quotation marks omitted). Under the Government's reading, the discretionary relief provision would "become a dead letter" for certain aliens. *Id.* The Court found "no evidence whatever" that this intersection "was even considered" by Congress. *Id.* at 132. The Court concluded: "We would hesitate long before adopting a construction [that] would, with respect to an entire class of aliens, completely nullify a procedure so intrinsic a part of the legislative scheme." *Id.* at 127-128.

Second, the Court considered an alternative argument put forth by the Government—namely that, based on a third statutory provision, denaturalization should "relate back" to the date of the original naturalization order. 376 U.S. at 128-129. While the plain language of the relation-back provision arguably answered the question, *see id.* at 139-140 (White, J., dissenting), as it stated that denaturalization "shall be effective as of the original date of the [naturalization] order," *id.* at 129 n.14, the Court did not focus on this language in isolation. Rather, the Court looked to whether there was

any indication that Congress intended the relation-back provision to apply to the deportation provision at issue, and found no such indication. *Id.* at 129.

The Government's construction, the Court noted, "would put [the alien] in a much more disadvantageous position than he would have occupied if he had never acquired a naturalization certificate at all." 376 U.S. at 131. Moreover, there was "not a single indication in the copious legislative history" to suggest that Congress intended the specific relation-back provision "to apply to the general deportation provisions of the Act." *Id.* at 129. The Court concluded that, if Congress had wanted such a result, "and thus to render nugatory and meaningless for an entire class of aliens the protections of [the discretionary relief provision], Congress could easily have said so." *Id.* at 132; *see also id.* ("[T]here is no evidence whatever that the question was even considered.").[5]

This case presents a closely analogous issue. As in *Costello*, the Government's reading would, "with respect to an entire class of aliens, completely nullify a procedure so intrinsic a part of the legislative scheme." 376 U.S. at 127-128; *see also id.* at 132 (rejecting construction that would "render nugatory and meaningless for an entire class of aliens" the discretionary relief at issue). Motions to reopen are at least as important a

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[5] The Court adopted this construction notwithstanding the fact that Costello had obtained citizenship through "willful misrepresentation." 376 U.S. at 121, 130-131. As a result, Costello was likely better off because he had committed fraud because, under the Court's construction, the crimes Costello committed while a citizen (even though his citizenship was fraudulently obtained) did not count for purposes of the deportation provision. *See* 376 U.S. at 130-131; *id.* at 135 (White, J., dissenting).

part of the legislative scheme as the discretionary relief at issue in *Costello*: Motions to reopen have been a part of deportation proceedings for over 90 years, and, indeed, Congress expressly codified the right in 1996. Moreover, the "class of aliens" being deprived of relief in *Costello* was, by definition, a class that had committed crimes. *Id.* at 121, 126-127. Here, the aliens being deprived of relief are a favored subset who have *not* committed certain crimes and who, in many instances, must establish "good moral character" in order to be eligible for relief. 8 U.S.C. § 1229c(a)(1), (b)(1)(B)-(C); *see also* Part I.C *infra*.

There are four additional similarities. *First*, as in *Costello*, 376 U.S. at 124-125, 129, the plain language of the statutory provisions does not resolve the question at issue,[6] and the ambiguity is particularly apparent

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[6] Although Congress set forth the length of the voluntary departure period, it did not choose the same language and structure of usual statutory time limits. Ordinarily, time limits state an affirmative obligation, directing an event to occur within a certain time limit. Indeed, this is the case with the timing of motions to reopen themselves, as well as other time limits in the INA affecting official action. *See* 8 U.S.C. § 1229a(c)(7)(C)(i) ("the motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal"); *id.* § 1229a(c)(6)(B) ("The motion [to reconsider] must be filed within 30 days of the date of entry of a final administrative order of removal."); *id.* § 1226a(a)(5) ("The Attorney General shall place an alien detained under paragraph (1) in removal proceedings, or shall charge the alien with a criminal offense, not later than 7 days after the commencement of such detention."). The provisions at issue here, however, do not state any affirmative obligation. Instead of directing the alien's actions, they passively describe a "period" during which "permission to depart" remains "valid." *Id.* § 1229c(a)(2)(A), (b)(2) ("[P]ermission to depart voluntarily under this subsection shall not be valid for a period exceeding [120 or 60] days."). Given that Congress imposed such express time limits on multiple other occasions

when the interaction of the relevant provisions is considered.[7] Indeed, the agency itself has acknowledged that the plain language does not resolve whether tolling applies. In a 1997 interim rule, the Department of Justice noted the question presented by the interaction of the two provisions, and proposed three possible ways to address the issue, two of which involved some form of tolling. 62 Fed. Reg. at 10,325-10,326.

Similarly, the agency has recognized that the statutory language permits tolling in the related context of

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in the INA itself, this language is open to a less strict construction. Moreover, the question in this case does not fit comfortably within a plain language analysis; even if one considered the language to be clear, it would not necessarily preclude tolling. Tolling, by its very nature, becomes relevant because of seemingly inflexible time limits and thus arises in the context of language that, on its face, would appear to preclude it. *See* Part I.D *infra* (describing widespread application of tolling to strict statutory time limits).

[7] Regardless of any apparent clarity of the voluntary departure provision in isolation, consideration of the provision in the context of the statute and the 1996 amendments as a whole creates ambiguity. In *Costello*, the Court found ambiguity in the fact that the relation-back provision, though arguably clear on its face, did not specify how it would apply to the deportation provision at issue. 376 U.S. at 129. Likewise here, there is no indication how the voluntary departure provision should apply to the motion to reopen provision. *See also Witkovich*, 353 U.S. at 199-200 (refusing to read clause literally to confer upon the Attorney General unbridled discretion to require information from certain deportable aliens, and instead finding limitations on that discretion based on a reading of the clause in the context of the statute as a whole); *accord Shiver* v. *United States*, 159 U.S. 491, 494, 497 (1895) (rejecting a literal interpretation of a statute making it a crime to cut timber on "lands of the United States" because a second statute granting settlers "the privilege of residing on the land for five years" in order to perfect a homestead "would be ineffectual if [the settler] had not also the right to build himself a house, outbuildings, and fences, and to clear the land for cultivation").

administrative appeals. An administrative appeal "tolls the running of the time authorized by the Immigration Judge for voluntary departure." *Matter of A-M-*, 23 I. & N. Dec. 737, 743 (BIA 2005). In 2005, the BIA reexamined its longstanding practice of permitting such tolling[8] in light of Congress's addition of time periods to the voluntary departure scheme: The BIA concluded that "recent statutory and regulatory changes have not altered the basic [tolling] principle." *Id.*

Second, as in *Costello*, there is no indication that Congress even considered the tolling question at issue here.[9] As this Court has noted, such an absence is noteworthy in light of the "comprehensive character" of IIRIRA's legislative history. *See INS* v. *St. Cyr*, 533 U.S. 289, 320 n.44 (2001) (noting the significance of the fact that "despite [the legislative history's] comprehensive character, it contains no evidence that Congress specifically considered the question" at issue (citing *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 602 (1980) (Rehnquist, J., dissenting) ("In a case where the construction of legislative language such as this makes so sweeping and so relatively unorthodox a change as that made here, I think judges as well as detectives may take into consideration the fact that a watchdog did not bark in the night."))); *see also Costello*, 376 U.S. at 129 ("not a

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[8] *See Matter of Chouliaris*, 16 I. & N. Dec. 168, 170 (BIA 1977); *Matter of Villegas Aguirre*, 13 I. & N. Dec. 139, 140 (BIA 1969).

[9] For example, there is no mention of the interaction between voluntary departure and motions to reopen in the congressional reports on IIRIRA. *See* H.R. Conf. Rep. No. 104-828 (1996); H.R. Rep. No. 104-469, pt. 1 (1996); S. Rep. No. 104-249 (1996).

single indication in the copious legislative history" to suggest that Congress intended a particular result).[10]

Third, as in *Costello*, the Government's reading would "put [the alien] in a much more disadvantageous position than he would have occupied if he had never acquired [voluntary departure] at all." 376 U.S. at 131. In *Costello*, the Court focused on the fact that if Costello had been convicted of the crime while he was an alien (as opposed to when he was a citizen), he would have been able to apply for a type of discretionary relief. The Court rejected an interpretation that would have resulted in Costello's effectively losing this relief. *Id.* at 130-131. A similar disadvantage arises here. Absent tolling, a recipient of voluntary departure is placed in a much worse situation if his circumstances change and he seeks reopening. As the facts of this case demonstrate, the alien cannot withdraw his voluntary departure request, Pet. App. 3-4, and is then subject to additional penalties because he accepted voluntary departure, 8 U.S.C. § 1229c(d)(1).

Finally, this Court should resolve any remaining ambiguity in favor of Petitioner. 376 U.S. at 128. As in *Costello*, even if the matter were still in doubt, the Court would "nonetheless be constrained by accepted principles of statutory construction in this area of the

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[10] Congress's lack of consideration makes sense in the circumstances. Pre-IIRIRA, the harsh results of a no-tolling rule did not come to light. Before 1996, there were no limits on the time period for voluntary departure, *see generally* 8 U.S.C. § 1254(e) (1994) (repealed 1996); therefore, even without a tolling rule, aliens granted voluntary departure were not effectively deprived of the right to seek reopening (which at that time was only a creature of regulation). *Cf. Matter of Shaar*, 21 I. & N. Dec. 541, 546-548 (BIA 1996) (pre-IIRIRA decision concluding that motion to reopen did not toll voluntary departure period).

law to resolve that doubt in favor of the petitioner": "'[S]ince the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used.'" *Id.* (quoting *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 10 (1948)); *see also St. Cyr*, 533 U.S. at 320 (invoking the "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien" (internal quotation marks omitted)).

2. This Court should not presume that Congress created a Hobson's choice or an arbitrary system

Under this Court's precedents, this Court should not presume that Congress created a Hobson's choice for aliens. A tolling rule ensures that voluntary departure recipients receive a decision on the merits of their motions to reopen. Under a no-tolling rule, however, an alien who files a timely motion to reopen during the voluntary departure period must either stay in the country awaiting a ruling on his motion to reopen and risking penalties for overstaying the deadline, or abide by the departure deadline, and forgo a decision on the motion. *See* 8 C.F.R. § 1003.2(d).[11]

In *Stone* v. *INS*, 514 U.S. 386 (1995), the Court adopted a construction that would avoid such a Hobson's choice. *Id.* at 398; *see also id.* at 399 ("This

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[11] This regulation has been the subject of litigation, though has been upheld in the Fifth Circuit. *Compare, e.g.*, *Navarro-Miranda* v. *Ashcroft*, 330 F.3d 672, 675-676 (5th Cir. 2003) (holding that regulation (previously designated at 8 C.F.R. § 3.2(d)) is enforceable), *with William* v. *Gonzales*, 499 F.3d 329, 334 (4th Cir. 2007) (holding that regulation is invalid) *and Reynoso-Cisneros* v. *Gonzales*, 491 F.3d 1001, 1002 (9th Cir. 2007) (limiting scope of regulation).

choice is one Congress might not have wished to impose on the alien."). The choice there was all the more difficult because "the consequences of deportation are so final, unlike orders in some other administrative contexts." *Id.* at 399. Here, as in *Stone*, this Court should not presume that Congress wanted aliens to face an untenable choice.[12]

This Court should also not presume that Congress intended to create an arbitrary system. The Government's interpretation would ascribe to Congress the intent to deprive a subset of voluntary departure recipients of the ability to benefit from a motion to reopen based on arbitrary government action or inaction. The statutory scheme, on its face, does not make it impossible for an alien to receive voluntary departure and also receive a decision on his motion to reopen. The sole determinant whether a voluntary departure recipient's motion to reopen will—or will not—be considered is how quickly the BIA happens to act. If the BIA acts quickly, then the motion will be considered; if not, it will not.

In fact, this is precisely what happens in practice. Some motions to reopen are decided quickly, in as few as 23 days.[13] However, notwithstanding the "dra-

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[12] *Stone* is discussed in more detail at n.26 *infra*.

[13] *See Matter of Bastos Borges*, 2007 WL 1192549 (BIA Mar. 30, 2007) (motion to reopen denied in 23 days); *see also, e.g.*, *Matter of Estrada-Campos*, 2007 WL 2463956 (BIA Aug. 3, 2007) (motion to reopen granted in 35 days); *Matter of Guerrero*, 2007 WL 2299599 (BIA July 23, 2007) (motion to reopen denied in 31 days); *Matter of Mendiola*, 2007 WL 2074492 (BIA June 11, 2007) (motion to reopen denied in 28 days); *Matter of Raja*, 2007 WL 1168550 (BIA Mar. 2, 2007) (motion to reopen granted in 25 days); *Matter of Madramuthu*, 2007 WL 1129362 (BIA Feb. 13, 2007) (motion to reopen granted in 26 days).

matic[]" "increase[] [in] disposition rate[s]," 67 Fed. Reg. at 54,899, many decisions on motions to reopen take longer.[14] And it is arbitrary government action alone that determines whether a particular voluntary departure recipient will fall within class A (such that he could have his motion to reopen adjudicated absent tolling) or class B (and be denied this right).

This Court should not presume that Congress intended this result. *See United States* v. *Wilson*, 503 U.S. 329, 334 (1992) (rejecting an "interpretation of the statute [that] would make the award of credit [for time served] arbitrary, a result not to be presumed lightly"); *see also Delgadillo* v. *Carmichael*, 332 U.S. 388, 391 (1947) (avoiding a construction that would make an alien's ability to remain in the United States turn on "fortuitous and capricious" circumstances).

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Thus, the Government's reading would effectively render an important statutory provision meaningless for an entire class of aliens. Under *Costello*, this interpretation should be rejected. In addition, a no-tolling rule would force aliens into a Hobson's choice and subject the viability of their claims to the arbitrary speed of agency decision-making: Congress should not be presumed to have intended either result.[15]

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[14] *See, e.g., Matter of Arriazola-Hernandez*, 2007 WL 2463984 (BIA July 31, 2007) (motion to reopen granted in just over four months); *Matter of Barragan-Toro*, 2007 WL 2074428 (BIA June 14, 2007) (motion to reopen granted in over six months).

[15] There can be no argument that *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), applies. The Government has conceded that the Department of Justice has not yet taken an official position on the tolling question presented. Opp. 14-15 & n.5. As the Government has noted, the

B. The Statutory Structure Does Not Require Voluntary Departure Recipients To Explicitly Or Implicitly Waive Their Motions To Reopen Or Other Administrative Appeals

The courts of appeals have suggested that voluntary departure is a form of settlement: the alien, in return for the right to manage his own departure, waives certain rights, including a motion to reopen. But that is not what the statute says. And there is no indication that Congress intended that a voluntary departure recipient be required to waive a motion to reopen as part of a *quid pro quo* for a grant of voluntary departure.

Congress could, of course, have crafted a scheme under which a voluntary departure recipient would be required to waive all appeals—administrative and judicial—in exchange for a grant of voluntary departure.

Department considered issuing regulations to address this question in 1997, but failed to do so. *Id.* n.5; *see also* 62 Fed. Reg. at 10,325-10,326. Nor has there been a precedential BIA decision on the issue following IIRIRA's amendments; and single-member, non-precedential orders of the BIA are not entitled to deference. *See* 8 C.F.R. 1003.1(e)(6)(ii); *see also, e.g., Rotimi* v. *Gonzales*, 473 F.3d 55, 57 (2d Cir. 2007) (per curiam) ("Because there is no indication that the BIA's nonprecedential single-member decision was 'promulgated' under its authority to 'make rules carrying the force of law,' we do not accord it *Chevron* deference" (quoting *United States* v. *Mead Corp.*, 533 U.S. 218, 226-227 (2001)). Thus, even assuming arguendo that *Chevron* would apply in this context, there is no relevant decision to defer to under *Chevron*.

While the Government has indicated that a regulation relating to the "reinstatement" of voluntary departure, 8 C.F.R. § 1240.26(h), speaks to the tolling question, Opp. 13-14, the Department of Justice plainly does not view the regulation as controlling. Indeed, the reinstatement provision was promulgated in 1997 as part of the same interim rule in which the Department posed the question whether a motion to reopen should toll the voluntary departure period. 62 Fed. Reg. at 10,325-10,326, 10,373.

But it did not. By its plain terms, the statute does not require any such waiver. *See Costello*, 376 U.S. at 132 (if Congress had wanted to waive statutory protections, it "could easily have said so"). By contrast, other provisions of the INA expressly require an alien to waive appeals. *See, e.g.*, 8 U.S.C. § 1187(b) (requiring "[w]aiver of rights" to appeal for aliens in visa waiver program);[16] *see also St. Cyr*, 533 U.S. at 318-319 (declining to infer congressional intent to apply a provision of IIRIRA retroactively where Congress was "willing[], in other sections of IIRIRA, to indicate unambiguously its intention to apply specific provisions retroactively").

The courts of appeals that have rejected tolling have misunderstood this critical fact: all three courts have erroneously suggested that an alien who accepts voluntary departure must waive certain rights.[17] While this is true as a matter of regulation for aliens who accept voluntary departure *before* the conclusion of proceedings, 8 C.F.R. § 1240.26(b)(1)(i)(D), it is false with

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[16] In 1996, Congress created a specific mechanism called "stipulated removal." 8 U.S.C. § 1229a(d) (added by IIRIRA, § 304(a)(3), 110 Stat. at 3009-593). Under this mechanism, such "[a] stipulated order shall constitute a conclusive determination of the alien's removability from the United States." *Id.*; *see also* 8 C.F.R. § 1003.25(b)(6). Tellingly, the voluntary departure provision does not refer to stipulated removal.

[17] *See Chedad*, 497 F.3d at 63 (stating that "voluntary departure [is] available only to aliens who agree to give up the fight and leave the country willingly"); *Banda-Ortiz*, 445 F.3d at 390 (suggesting that voluntary departure precludes an alien from "the chance of winning outright" (internal quotation marks omitted)); *Dekoladenu*, 459 F.3d at 506 ("A motion to reopen remains available to all aliens, but an alien who requests voluntary departure will forfeit his right to a decision on his motion to reopen if the IJ grants his request."); *id.* at 504 n.3 ("two types of voluntary departure implicate the same principles").

respect to aliens, such as Petitioner, who agree to voluntary departure at the conclusion of proceedings. *See id.* § 1240.26(c).[18] In the present case, for example, the immigration judge expressly asked whether Petitioner "reserve[d] appeal," and Petitioner's counsel confirmed that he did. C.A. App. 167.

Thus, under the statute and regulations, an alien granted voluntary departure at the end of proceedings: (1) is not required to waive administrative and judicial appeals; (2) has the right to file an appeal to the BIA (during which the voluntary departure period is tolled); and (3) has the right to judicial review of his final order of removal. Under the Government's view, then, the *only* right that the voluntary departure recipient waives by accepting voluntary departure is the right to a single motion to reopen—notwithstanding the fact that Congress *codified* the motion to reopen in 1996, and there is no indication whatsoever that Congress considered the issue. Congress could have required the waiver of a motion to reopen as a condition of voluntary departure, "but it makes no sense to suggest Congress did it under its breath." *Cook County, Ill.* v. *United States*, 538 U.S. 119, 133 (2003); *see also, e.g., Winkelman ex rel.*

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[18] The Board has noted that the purpose of voluntary departure in lieu of or before the conclusion of proceedings is "to quickly and efficiently dispose of numerous cases[.]" *Matter of Arguelles-Campos*, 22 I. & N. Dec. 811, 817 (BIA 1999); *see also* 62 Fed. Reg. at 10,325 (the agency "believes that voluntary departure authorized by immigration judges *prior to completion of proceedings* should be for the purpose of settling cases in the interests of economy and justice" (emphasis added)). The agency has not set forth the same rationale with respect to voluntary departure at the conclusion of proceedings. *See Arguelles-Campos*, 22 I. & N. Dec. at 817 (noting the "significant differences" between these two types of voluntary departure).

Winkelman v. *Parma City Sch. Dist.*, 127 S. Ct. 1994, 2002 (2007) ("[T]he Act does not *sub silentio* or by implication bar parents from seeking to vindicate the rights accorded to them once the time comes to file a civil action."); *Bates* v. *Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005) ("If Congress had intended to deprive injured parties of a long available form of compensation, it surely would have expressed that intent more clearly.").

Moreover, in light of settled agency decisions in a related context, there is no reason to think that Congress would have required an implicit waiver of a motion to reopen as a condition of voluntary departure. It is well settled, for example, that for an alien to waive administrative appeals, the waiver must be a knowing one. *Matter of Patino*, 23 I. & N. Dec. 74, 76 (BIA 2001) (because of the "profound ramifications" of "relinquish[ing] the parties' opportunity to seek review of the Immigration Judge's ruling," any waiver must be "knowingly and intelligently made"); *Matter of Ocampo-Ugalde*, 22 I. & N. Dec. 1301, 1304 (BIA 2000) (holding that for those aliens who waive appeal rights by accepting voluntary departure (*i.e.*, those who accept voluntary departure before the conclusion of proceedings), the waiver must be a knowing one); *see also United States* v. *Mendoza-Lopez*, 481 U.S. 828, 840 (1987) (where immigration judge "permitted waivers of the right to appeal that were not the result of considered judgments" by the aliens, resulting in "waivers of their rights to appeal [that] were not considered or intelligent," Government may not rely on deportation order "as reliable proof of an element of a criminal offense").

The notion that Congress intended an implicit waiver is further undercut by the fact that Congress has required that voluntary departure recipients be given adequate notice of the penalties of overstaying a

departure period. *See* 8 U.S.C. § 1229c(d)(3). Given Congress's concern that aliens receive notice of the implications of voluntary departure, there is no reason to think that Congress intended to deprive aliens of this right without notice (or at all).[19]

Finally, it makes little sense to imagine that Congress intended to condition voluntary departure on an implicit waiver of the right to a motion to reopen, in light of the fact that *some* voluntary departure recipients will still be able to obtain adjudication of their motions. As discussed above, some voluntary departure recipients will have their motions to reopen considered, as in some cases the agency will act promptly and decide the motion within the voluntary departure period. *See* Part I.A.2 *supra*. Thus, for an implicit waiver of a motion to reopen, Congress would need to have intended waiver not by *all* voluntary departure recipients, but only by the subset whose motions would not be adjudicated during the voluntary departure period.

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[19] It is also incongruous to think that Congress intended voluntary departure recipients to forfeit their motions to reopen in light of its deliberate actions to preserve an alien's avenue to relief in the related context of judicial review. Specifically, before the 1996 amendments, the INA provided that no court had the authority to consider a petition for review if the alien left the country. *See* 8 U.S.C. § 1105a(c) (1994) ("An order of deportation or of exclusion shall not be reviewed by any court if the alien ... has departed from the United States after the issuance of the order."). The 1996 amendments made it easier for the agency to deport aliens pending judicial review, *see* 8 U.S.C. § 1252(b)(3)(B), (f)(2), but, importantly, repealed the provision that prevented an alien from petitioning for review from abroad, *see* 8 U.S.C. § 1105a(c) (1994), *repealed by* IIRIRA, § 306(b), 110 Stat. at 3009-612. Congress therefore ensured that aliens are able to receive a decision on the merits of their petitions for review from outside the country.

And, of course, the determination of which category a given alien would fall into would be based entirely on the arbitrary actions of the agency.[20]

C. The 1996 Amendments Indicate That Congress Did Not Intend To Privilege Criminal Aliens Over The Favored Class Of Aliens Eligible For Voluntary Departure

The Government's construction of the relevant statutory provisions should also be rejected because it turns congressional intent on its head, as it benefits criminal aliens over the favored aliens who are eligible for voluntary departure.

When Congress passed IIRIRA in 1996, one of its primary concerns was to enact reform with respect to aliens who had committed crimes. As this Court has stated, Congress acted against a "backdrop of wholesale failure by the INS to deal with increasing rates of criminal activity by aliens." *Demore* v. *Kim*, 538 U.S. 510, 518 (2003). In the months leading up to the passage of

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[20] The courts of appeals that have rejected tolling have made another error. Specifically, these courts have stated that one of the "main attractions" of voluntary departure is that aliens granted this relief do not face the same bars on readmission as aliens subject to a removal order. *Chedad*, 497 F.3d at 63 n.8; *Banda-Ortiz*, 445 F.3d at 389-390; *Dekoladenu*, 459 F.3d at 506. While it is true that voluntary departure recipients do not face the admissibility bar in 8 U.S.C. § 1182(a)(9)(A) (which renders an alien who has been ordered removed inadmissible for five or ten years), there is a distinct ten-year bar for aliens who are unlawfully present in the United States for more than one year; this bar is triggered by an alien's departure, *see id.* § 1182(a)(9)(B)(i)(II). As a result, a large number of aliens granted voluntary departure face the same bars on admissibility upon leaving voluntarily as under a removal order.

IIRIRA, Congress devoted extensive study to the problems posed by criminal aliens.[21]

Motivated by these concerns, Congress enacted numerous provisions stiffening the penalties for criminal aliens and restricting eligibility for relief. In IIRIRA, Congress both expanded the definition of those crimes for which aliens are deportable and made this definition retroactively applicable. *See* IIRIRA, § 321, 110 Stat. at 3009-627 (codified at 8 U.S.C. § 1101(a)(43)). Congress also provided for mandatory detention of criminal aliens. *Id.* § 305, 110 Stat. at 3009-598 (codified at 8 U.S.C. § 1226(c)). At the same time, Congress made criminal aliens ineligible for certain relief. *Id.* § 304, 110 Stat. at 3009-595 (codified at 8 U.S.C. § 1229b(a), (b)).

By contrast, voluntary departure is only available to a favored subset of aliens. Aliens who have committed aggravated felonies or terrorism offenses, for example, are barred by statute from receiving voluntary departure. 8 U.S.C. § 1229c(a)(1), (b)(1)(C). And, for those who obtain voluntary departure at the conclusion of removal proceedings (such as Petitioner), the statute requires that the alien demonstrate "good moral character" for the preceding five years. *Id.* § 1229c(b)(1)(B).

In addition, because voluntary departure is a form of discretionary relief, it is limited to an even more favored subset of aliens. The BIA has held that, in exercising discretion, immigration judges must balance a

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[21] *See* S. Rep. No. 104-48, at 1 (1995) ("America's immigration system is in disarray and criminal aliens ... constitute a particularly vexing part of the problem."); H.R. Rep. No. 104-22, at 6 (1995) ("The increasing public attention paid to our nation's immigration policies has brought to light the high number of aliens, both legal and illegal, who commit crimes while enjoying the benefits of this country.").

range of positive and negative factors, including whether the alien has any criminal record, has committed additional violations of immigration law, or has strong family ties to the United States. *Matter of Arguelles-Campos*, 22 I. & N. Dec. 811, 817 (BIA 1999).

Under the Government's reading of the statute, however, criminal aliens are privileged over voluntary departure recipients. Under the current regulatory framework, criminal aliens have a right to file a motion to reopen and, in many cases, will have those motions adjudicated. While such motions are deemed withdrawn once the alien is deported, 8 C.F.R. § 1003.2(d), criminal aliens may seek an administrative stay of their removal orders while their motions to reopen are pending. *See id.* §§ 1003.2(f), 241.6.[22] Moreover, it often takes time for the immigration authorities to enforce a removal order (and sometimes such orders are simply unenforced), which permits time for motions to be adjudicated.[23] By contrast, under a no-tolling rule, the favored subset of aliens who receive voluntary departure are effectively precluded from receiving an adjudication on their motions to reopen. Because the Government's construction is inconsistent with the statutory framework, it should be rejected. *See, e.g., Gonzaga Univ.* v. *Doe*, 536 U.S. 273, 290 (2002) (construing statute in light of other enactments by same Congress); *New York State Confer-*

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[22] On their face, these regulations do not appear to apply to the grant of voluntary departure. *See* pp. 36-37 *infra* (discussing difference between a grant of voluntary departure and a final order of removal).

[23] *See, e.g.*, DHS, *Performance Budget Overview* 8 (FY 2007), *available at* http://www.dhs.gov/xlibrary/assets/Budget_PBO_FY2007.pdf.

ence of Blue Cross & Blue Shield Plans v. *Travelers Ins. Co.*, 514 U.S. 645, 667 (1995) (same).

The Government's construction is particularly untenable in light of the fact that, when considering IIRIRA, Congress was especially concerned about criminal aliens abusing motions to reopen. Congress determined that criminal aliens often succeeded in "delay[ing] their deportations for years by taking advantage of an often-times irrational, lengthy and complex system of hearings and appeals." S. Rep. No. 104-48, at 2 (1995); *see also Criminal Aliens in the United States: Hearings Before the Permanent Subcomm. on Investigations of the S. Comm. on Governmental Affairs*, 103d Cong. 67 (1993) (Judge Fong Testimony).[24] While, in the end, Congress did not bar criminal aliens from seeking motions to reopen, it would be odd, to say the least, to interpret the statute to permit criminal aliens to file motions to reopen, but effectively bar those with good moral character from doing the same.

This Court has not hesitated to reject an interpretation that creates such "anomalies." In *Small* v. *United States*, 544 U.S. 385 (2005), for example, the Court considered whether the phrase "convicted in any court" included a conviction in a foreign court. While there was a fair argument that the plain language answered the question in the affirmative, *see id.* at 396-397 (Thomas, J., dissenting), the Court rejected that view. The Court considered the "anomalies" that would

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[24] Senator Spencer Abraham also raised this special concern, and suggested eliminating motions to reopen for criminal aliens. *See* 142 Cong. Rec. S4592, S4599 (May 2, 1996) (objecting to the fact that "criminal aliens will still be able to ... make a motion to reopen on the basis of changed circumstances ... [c]riminal aliens should be allowed only one bite at the apple").

arise if the statute were read to include foreign convictions, which would create "senseless distinction[s]" between covered domestic crimes and uncovered foreign crimes. *Id.* at 391-392. Such an interpretation was disfavored where there was no evidence that Congress considered the question. *Id.* at 390-391. Indeed, the Court rejected an interpretation that would lead to anomalous results notwithstanding the fact that it could be understood to advance the statute's purpose. *Id.* at 393;[25] *see also, e.g., Nixon* v. *Missouri Municipal League*, 541 U.S. 125, 137, 138 (2004) (concluding that in light of a "host of ... incongruities that would follow," it was "farfetched" to think Congress meant a particular result in the absence of a "clearer signal"). In the present case, tolling would avoid the perverse results that would otherwise follow from the Government's interpretation.

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[25] The Court's analysis in *Small* was based in part on the background rule that Congress generally intends its laws to have domestic, rather than extraterritorial, application. Yet, as the Court acknowledged, that background rule was not directly applicable. 544 U.S. at 389 ("[A]lthough the presumption against extraterritorial application does not apply directly to this case, we believe a similar assumption is appropriate" in construing the term at issue); *cf. id.* at 399 (Thomas, J., dissenting) (criticizing the majority for relying on an "entirely different, and well-recognized, canon against extraterritorial application of federal statutes," which the "majority rightly concedes ... does not apply directly to this case" (internal quotation marks omitted)). Even more powerfully, then, the "longstanding principle" of construing any lingering ambiguities in favor of the alien, *St. Cyr*, 533 U.S. at 320, supports a reading of the relevant provisions governing motions to reopen and voluntary departure that recognizes tolling.

D. In Other Contexts, This Court Has Concluded That A Motion To Reopen Or Reconsider Tolls An Otherwise Applicable Statutory Time Period

A holding that the voluntary departure period is tolled during the pendency of a timely motion to reopen also finds support in this Court's precedents addressing motions to reopen and to reconsider in a number of different but related contexts.

For over a century and a half, it has been the "traditional and virtually unquestioned practice" of this Court to find that a motion to reopen or to reconsider a tribunal's own decision automatically tolls the deadline for seeking further review elsewhere. *United States* v. *Healy*, 376 U.S. 75, 79 (1964). As early as 1844, in an opinion by Justice Story, this Court held that a motion to reopen a judgment of the court of appeals tolled the time for filing a further appeal. *Brockett* v. *Brockett*, 43 U.S. (2 How.) 238, 241 (1844). This tolling rule has been broadly applied to motions to reopen or reconsider (as well as motions for a new trial) in both civil and criminal cases, and before agencies, trial courts, and appellate courts. *See, e.g.*, *United States* v. *Ibarra*, 502 U.S. 1, 6-8 (1991) (per curiam); *Missouri* v. *Jenkins*, 495 U.S. 33, 45 (1990); *ICC* v. *Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 284 (1987); *United States* v. *Dieter*, 429 U.S. 6, 7-9 (1976) (per curiam); *Morse* v. *United States*, 270 U.S. 151, 153-154 (1926); *see also Stone*, 514 U.S. at 404 (referring to the "normal" tolling rule).[26]

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[26] The Government's suggestion (Opp. 11) that *Stone* controls here is misguided. In *Stone*, this Court held that Congress had crafted a limited exception to this general rule. 514 U.S. at 393, 397-398. As an initial matter, the Court recognized the general rule, *i.e.*, that motions to reopen or reconsider ordinarily render a

This Court has repeatedly permitted tolling notwithstanding strict statutory language that would seem to prohibit such a result. In *Ibarra*, for example, this Court held that a motion for reconsideration of a trial court's decision tolled the period for judicial review, despite the language in 18 U.S.C. § 3731, which provided that, "[a]n appeal by the United States [of a trial court's order suppressing or excluding evidence] ... *shall be taken within thirty days* after the decision, judgment or order has been rendered *and shall be diligently prosecuted.*" 502 U.S. at 3 n.1, 7 (emphasis added).[27] Likewise, in *Morse*, this Court stated that a timely motion for a new trial from a judgment of the Court of Claims tolled the time for appeal, notwithstanding statutory language directing that, "All appeals from the Court of Claims shall be taken within ninety days after the judgment is rendered[.]" 270 U.S. at 153.[28]

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final order nonfinal and toll the period for judicial review. *Id.* at 391-392 (discussing *Locomotive Eng'rs*). The Court focused on one statutory provision in particular, which provided for the consolidation of two kinds of petitions for judicial review (petitions for review of a deportation order and petitions for review of an agency reopening or reconsideration decision). *Id.* at 393-398; *see also* 8 U.S.C. § 1105a(a)(6) (1994) (repealed 1996) (current version at 8 U.S.C. § 1252(b)(6)). Because only a no-tolling rule would give rise to two separate petitions for review, the Court considered this consolidation provision as an "explicit exception" to the tolling rule in this "particular context." 514 U.S. at 397, 398.

[27] In *Ibarra*, the Court applied the tolling rule notwithstanding the fact that the motion for reconsideration was based on previously abandoned grounds: "[w]ithout a clear general rule litigants would be required to guess at their peril." 502 U.S. at 7.

[28] Indeed, this Court has explicitly acknowledged that there is no statutory authority for a tolling rule. *See, e.g., Dieter*, 429 U.S. at 8 n.3 (applying tolling notwithstanding "the lack of a statute or rule expressly authorizing [such tolling]").

In fact, this Court's own rules permit tolling notwithstanding a strict statutory deadline. The time period for filing a petition for certiorari is governed by statute, 28 U.S.C. § 2101(c), which provides that a writ of certiorari "shall be taken or applied for within ninety days after the entry of [the] judgment or decree." *See also* S. Ct. R. 13.1. This deadline is generally considered to be a jurisdictional one. *Id.* 13.2; *see also Bowles* v. *Russell*, 127 S. Ct. 2360, 2365 (2007) (certiorari deadline is jurisdictional); *Jenkins*, 495 U.S. at 45 & n.13. Notwithstanding the text of Section 2101(c), this Court's rules provide that a petition for rehearing in a court of appeals tolls the time for seeking review. *See* S. Ct. R. 13.3.

This precedent highlights that, in this different but related context, a motion to reopen or to reconsider can operate to suspend a statutory deadline. This present case, of course, does not involve a statutory period for seeking judicial review, but, rather, a period within which an alien is to depart the country voluntarily. This difference makes the present case a stronger candidate for tolling. First, unlike the final orders at issue in this Court's tolling precedents,[29] the voluntary departure order itself is not a final order of deportation. *See* 8 U.S.C. § 1101(a)(47) (defining "order of deportation"). Under the applicable regulations, an immigration judge who grants voluntary departure "shall also enter an *alternate* order o[f] removal," 8 C.F.R.

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[29] *See, e.g.*, *Dieter*, 429 U.S. at 8 (noting "the consistent practice in civil and criminal cases alike has been to treat timely petitions for rehearing as rendering the original judgment nonfinal for purposes of appeal for as long as the petition is pending"); *Healy*, 376 U.S. at 77-80 (petition for rehearing filed by the Government in a criminal case rendered the judgment nonfinal for purposes of appeal).

§ 1240.26(d) (emphasis added), and, provided that the alien abides by certain conditions, this alternate order remains administratively inactive throughout the voluntary departure period. *See, e.g.*, 8 C.F.R. § 1241.1(f). In other words, while this Court's precedents permit a *final* order to be rendered *nonfinal* by a motion to reopen, no such "undoing" is required here.

Second, this Court has permitted motions to reopen to toll *jurisdictional* deadlines, which are strictly construed. This Court has repeatedly emphasized that jurisdictional time limits are "mandatory" and cannot be altered by the Court "except as Congress permits." *Jenkins*, 495 U.S. at 45; *see also Bowles*, 127 S. Ct. at 2366. Nonetheless, the Court has held that a motion to reopen triggers automatic tolling even where the deadline involved is jurisdictional. *See, e.g., Jenkins*, 495 U.S. at 45 (petition for rehearing tolls the time for filing a petition for certiorari). A voluntary departure period presents an even stronger case for tolling because it does not implicate a jurisdictional bar.[30]

In fact, as noted, the BIA itself has long held that an administrative appeal tolls the voluntary departure period. *A-M-*, 23 I. & N. Dec. at 743 (timely filing of appeal "tolls the running of the time authorized by the Immigration Judge for voluntary departure"); *Matter*

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[30] The Court has relied on tolling in other contexts as well. In *Young* v. *United States*, 535 U.S. 43 (2002), for example, this Court applied equitable tolling to solve a statutory incongruity created by the interplay of several provisions of the Bankruptcy Code, which had created a statutory "loophole." *Id.* at 46, 47. While acknowledging that equitable tolling is typically limited to case-specific circumstances, this Court nonetheless held that such tolling was broadly applicable to the provision at issue, regardless of the particular facts of any individual case. *Id.* at 50-51.

of Chouliaris, 16 I. & N. Dec. 168, 170 (BIA 1977) (timely appeal tolls the running of the voluntary departure period); *Matter of Villegas Aguirre*, 13 I. & N. Dec. 139, 140 (BIA 1969) (same). While of course not controlling, the BIA's practice is especially significant because it tolls voluntary departure in circumstances virtually identical to this case—*i.e.*, while issues are pending before it—and notwithstanding the 60-day and 120-day time periods set forth by IIRIRA.

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Thus, statutory interpretation principles applied by this Court in a number of parallel contexts demand the conclusion that a timely motion to reopen automatically tolls a period of voluntary departure.

II. Constitutional Avoidance Strongly Favors An Interpretation That Permits Tolling

The doctrine of constitutional avoidance provides an additional rationale for adopting a tolling rule. The avoidance canon holds that where a statute is susceptible to more than one plausible construction, one of which raises "serious constitutional doubts," the reviewing court should adopt the interpretation that avoids these doubts. *Clark* v. *Martinez*, 543 U.S. 371, 380-382 (2005). It is clear that a plausible—indeed, superior—interpretation of the statute permits tolling of the voluntary departure period pending a motion to reopen. *See* Part I *supra*. A no-tolling rule, however, would raise serious constitutional doubts. Congress has provided aliens with the motion to reopen as one procedure in the scheme of procedures governing deportation. With Congress having done so, the Court should not presume that Congress intended for the arbitrary actions of immigration officials to deprive some aliens but not others of this procedure; this arbitrary treatment at the hands of government raises substan-

tial due process and equal protection concerns. In light of these concerns, the Court should permit tolling of the voluntary departure period pending a motion to reopen.

A. A No-Tolling Rule Would Raise "Serious Constitutional Doubts" Under The Due Process Clause

1. A no-tolling rule implicates liberty interests protected by the Due Process Clause

This Court has long recognized that an alien has a liberty interest, protected by the Due Process Clause, in remaining in this country, particularly where the alien has formed ties to the community. *See, e.g., Carlson* v. *Landon*, 342 U.S. 524, 537-538 (1942); *see also Yamataya* v. *Fisher*, 189 U.S. 86, 99-100 (1903); *Demore*, 538 U.S. at 523 ("'It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings.'" (quoting *Reno* v. *Flores*, 507 U.S. 292, 306 (1993))). Indeed, deportation "may result also in loss of both property and life, or all that makes life worth living." *Ng Fung Ho* v. *White*, 259 U.S. 276, 284 (1922). Accordingly, the Court has held that "[m]eticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness." *Bridges* v. *Wixon*, 326 U.S. 135, 154 (1945); *cf. Galvan* v. *Press*, 347 U.S. 522, 531 (1954) (holding that, despite its broad discretion over immigration matters, "the Government must respect the procedural safeguards of due process").

This liberty interest is protected by several procedures, under statutes and regulations, that guard against unlawful or erroneous deportation. *See, e.g., Bridges*, 326 U.S. at 154 ("We are dealing here with procedural requirements prescribed for the protection of the alien."); *see also, e.g.*, 8 U.S.C. § 1229a (setting forth procedural protections for removal proceedings).

The motion to reopen at issue in this case is one such procedure. Originally based in regulation, motions to reopen serve a critical purpose, offering a means to avoid deportation based on changed circumstances. *See* pp. 2-5 *supra*. Consistent with this important role, motions to reopen, which are available to all aliens, including voluntary departure recipients, are now an official part of the immigration code. *See* 8 U.S.C. § 1229a(c)(7).

Absent tolling, however, the availability of this procedure to voluntary departure recipients will depend entirely on arbitrary government action. If the BIA acts on the motion in time, before the expiration of the voluntary departure period, then the alien receives the procedural protection; if not, the alien is denied review by the BIA. And the speed with which the BIA acts may turn on any number of variables wholly unrelated to the alien and outside his control—vacation schedules, workloads, backlogs, and the work habits and whims of any given immigration official. BIA orders confirm significant variability in the timing of decisions on motions to reopen, some occurring swiftly enough to occur within a voluntary departure period, but many occurring too late. *Compare Matter of Bastos Borges*, 2007 WL 1192549 (BIA Mar. 30, 2007) (23 days), *with Matter of Barragan-Toro*, 2007 WL 2074428 (BIA June 14, 2007) (more than six months). *See also* Part I.A.2 *supra*.

"The touchstone of due process is protection of the individual against arbitrary action of government." *Wolff* v. *McDonnell*, 418 U.S. 539, 558 (1974) (quoting *Dent* v. *West Virginia*, 129 U.S. 114, 123 (1889)); *see also Demore*, 538 U.S. at 532 (Kennedy, J., concurring) ("[T]he Due Process Clause prohibits arbitrary deprivations of liberty."). Procedures are put in place to satisfy due process by guarding against such arbitrary depriva-

tions. *See, e.g., Vitek* v. *Jones*, 445 U.S. 480, 489 (1980) ("[D]ue process protections are necessary 'to insure that [a liberty interest] is not arbitrarily abrogated.'" (quoting *Wolff*, 418 U.S. at 557)). But to serve their protective purpose, the procedural protections must of course be available. And due process is violated where government action eliminates access to or otherwise bypasses such procedural protections in a given case. *See, e.g., Zadvydas* v. *Davis*, 533 U.S. 678, 718-724 (2001) (Kennedy, J., dissenting) (concluding that a "due process violation" would arise "[w]ere the INS, in an arbitrary or categorical manner, to deny an alien access to the administrative processes in place to review continued detention" because "aliens are entitled to be free from detention that is arbitrary or capricious.").[31]

This Court has gone further than this, requiring that the *procedures themselves* not be arbitrary, even in situations where the due process interest at stake is limited. *Ohio Adult Parole Authority* v. *Woodard*, 523 U.S. 272 (1998), considered a due process claim concerning the state clemency proceedings of a death row in-

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[31] The need for consistency in the availability of procedural protections is inherent in the concept of due process. In the particular context of immigration, the proposition that access to procedures protecting aliens' liberty interests cannot be arbitrarily eliminated finds support in the case law even in situations in which the procedure is a product of regulation, rather than statute. *See, e.g., Bridges*, 326 U.S. at 153 (holding that the alien could rely on BIA rules governing deportation procedures because "these rules are designed as safeguards against essentially unfair procedures"); *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954) (holding that the alien was entitled to a discretionary decision by the BIA on his application for suspension of deportation, which was provided for by regulation, and that, in light of the regulations, such decision could not be formed based on pressure from the Attorney General).

mate. Having identified an ongoing interest in Woodard's life, five members of the Court held that, notwithstanding that the governor had complete discretion and the state could eliminate clemency altogether, this interest warranted "some *minimal* procedural safeguards" for clemency proceedings. *See id.* at 288-289 (O'Connor, J., concurring in part and concurring in the judgment, joined by Souter, Ginsburg, and Breyer, JJ.); *see also id.* at 292 (Stevens, J., concurring in part and dissenting in part). Because of the due process interest, "[j]udicial intervention might, for example, be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process." *Id.* at 289 (O'Connor, J.).

Here, Petitioner is not seeking to regulate the discretion of the BIA in deciding the motion to reopen. Rather, he is making a more basic request that access to that discretion, which Congress has made available, not be arbitrarily eliminated by government action or inaction. Under a no-tolling rule, the chances that the BIA will review the motion on time are no more consistent or reliable than a coin flip. Given that Congress has made motions to reopen available, and even granted that the motions are resolved at the BIA's discretion, due process requires that the availability of such procedures not depend on arbitrary government action.

2. A no-tolling rule raises due process concerns over aliens' property interests in motions to reopen

The arbitrary elimination of the motion to reopen for a subset of aliens granted voluntary departure implicates property interests protected by the Due Process Clause. This Court has recognized property interests in

the right of access to adjudicative procedures, including those where the relief sought is not assured. And the Court has found that due process is violated where those property interests are arbitrarily eliminated by government action. Here, the no-tolling rule raises constitutional concerns by authorizing arbitrary deprivations of aliens' interests in the motion to reopen itself (as distinct from the underlying relief of reopening).

In *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982), the Court identified a property interest analogous to Petitioner's interest in the motion to reopen. Logan filed a timely charge of employment discrimination with a state commission but the claim was dismissed because, due to the commission's own inadvertence, it had failed to convene a fact-finding conference within the time period required by statute. *Id.* at 426-427.

Reversing, this Court held that Logan's "right to use the [state's] adjudicatory procedures" qualified as a "species of property protected by" the Due Process Clause. 455 U.S. at 428-429.[32] The Court observed that "'[w]hile the legislature may elect not to confer a property interest, ... it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards.'" *Id.* at 432 (quoting *Vitek*, 445 U.S. at 490-491 n.6). The state had deprived the plaintiff of the "opportunity to present his case and have its merits fairly judged." *Id.* at 433. "A system or procedure that deprives persons of their claims in a random manner ... necessarily presents an unjustifiably high risk that meritorious claims will be

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[32] The existence of such a property interest had been "affirmatively settled" in *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). *Logan*, 455 U.S. at 428.

terminated." *Id.* at 434-435. In the instant case, as in *Logan*, a no-tolling rule means that "it is the state system itself that destroys a complainant's property interest, by operation of law, whenever the Commission fails to convene a timely conference" (or in this case, the BIA fails to resolve the motion), *id.* at 423, whether the "action is taken through negligence, maliciousness, or otherwise," *id.* at 436.[33]

The Court has been careful to distinguish such an interest from the interest in the relief sought, which itself may not be a protected interest. The discretionary nature of the relief, though relevant to any interest in the relief, need not affect the constitutional status of the interest in the procedure itself. *See, e.g., American Mfrs. Mut. Ins. Co.* v. *Sullivan*, 526 U.S. 40, 61 & n.13 (1999) (observing that plaintiffs "do not contend that they have a property interest in their claims for payment, as distinct from the payments themselves"); *see also id.* at 62 (Ginsburg, J., concurring in part and concurring in the judgment).[34]

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[33] Since *Logan*, the Court has observed that "[l]ittle doubt remains that such an intangible interest is property protected by the Fourteenth Amendment." *Tulsa Prof'l Collection Servs., Inc.*, v. *Pope*, 485 U.S. 478, 485 (1988) (claim against an estate for an unpaid bill).

[34] The case law demonstrates that the discretion involved in the grant of the motion to reopen does not eliminate the due process protections applicable to the motion itself. In *Logan*, the Court made clear that Logan was not entitled to relief, but merely "to have the Commission consider the merits of his charge." 455 U.S. at 434; *see also St. Cyr*, 533 U.S. at 307 (explaining that "[e]ligibility that was 'governed by specific statutory standards' provided 'a right to a ruling on an applicant's eligibility,' even though the actual granting of relief was 'not a matter of right un-

Here, Congress has made motions to reopen available to aliens, including those receiving voluntary departure. Consistent with *Logan*, the availability of the motion cannot be decided arbitrarily based on whether or not the BIA decides the motion in time. Such arbitrary treatment would create an "unjustifiably high risk that meritorious claims" for motions to reopen "will be terminated." *Logan*, 455 U.S. at 435; *see also Banda-Ortiz*, 445 F.3d at 393 (Smith, J., dissenting) (concluding that "it cannot accord with due process for the resolution of motions to turn on the happenstance of how quickly an agency can clear its docket").

Nor is it any answer to say that the arbitrary elimination of the motion is a feature of the motion as codified by Congress. In *Arnett* v. *Kennedy*, 416 U.S. 134 (1974), five Justices rejected this view. *See id.* at 166-167 (Powell, J., concurring in part and concurring in the result in part, joined by Blackmun, J.); *id.* at 177-178 (White, J., concurring in part and dissenting in part); *id.* at 210-211 (Marshall, J., dissenting, joined by Douglas and Brennan, JJ.). Justice Powell explained:

> This view misconceives the origin of the right to procedural due process. That right is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in federal employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards.

Id. at 167; *cf. Vitek*, 445 U.S. at 490 n.6 (quoting Justice Powell's opinion in *Arnett* with approval). Here, once

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der any circumstances, but rather is in all cases a matter of grace'" (quoting *Jay* v. *Boyd*, 351 U.S. 345, 353-354 (1956))).

the agency and Congress have made motions to reopen available, the availability cannot be arbitrarily eliminated.

B. The Arbitrary Treatment Of Aliens Granted Voluntary Departure Under A No-Tolling Rule Raises Equal Protection Concerns

The disparate treatment of aliens granted voluntary departure based on arbitrary government actions raises an additional constitutional concern under the equal protection component of the Fifth Amendment.

Equal protection "imposes a requirement of some rationality in the nature of a class singled out." *James* v. *Strange*, 407 U.S. 128, 140 (1972) (quoting *Rinaldi* v. *Yeager*, 384 U.S. 305, 308-309 (1966)). Even where the Due Process Clause does not necessarily reach arbitrary deprivations of liberty or property, the principle of equal protection may restrain officials from engaging in differential treatment without rhyme or reason. *See, e.g.*, *Sandin* v. *Conner*, 515 U.S. 472, 487 n.11 (1995) (noting that even where due process does not apply, the Equal Protection Clause protects prisoners "from arbitrary state action even within the expected conditions of confinement"); *cf. City of Cuyahoga Falls* v. *Buckeye Cmty. Hope Found.*, 538 U.S. 188, 200 (2003) (Scalia, J., concurring) ("Those who claim 'arbitrary' deprivations of nonfundamental liberty interests must look to the Equal Protection Clause[.]").

Although the majority in *Logan* rested on due process, six Justices agreed that the treatment of Logan's claim failed the most basic requirements of the Equal Protection Clause. *See* 455 U.S. at 438-439 (Blackmun, J., separate opinion, joined by Brennan, Marshall, and O'Connor, JJ.); *id.* at 444 (Powell, J., concurring in the judgment, joined by Rehnquist, J.). As Justice Blackmun explained:

> certain randomly selected claims, because processed too slowly by the State, are irrevocably terminated without review. In other words, the State converts similarly situated claims into dissimilarly situated ones, and then uses this distinction as the basis for its classification. This, I believe, is the very essence of arbitrary state action.

Id. at 442 (Blackmun, J., separate opinion). Justice Powell agreed that the Illinois law had been applied in an "arbitrary and irrational" manner and therefore violated equal protection. *Id.* at 444 (Powell, J., concurring in the judgment).

Just as in *Logan*, the randomness of BIA timing converts similarly situated aliens granted voluntary departure into dissimilarly situated aliens for no reason.

C. The Constitutional Avoidance Canon Favors A Construction Of The Statute That Permits Tolling

Constitutional avoidance is "a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Clark*, 543 U.S. at 381; *see Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("[T]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." (internal quotation marks omitted)). Here, in light of the substantial constitutional concerns that would otherwise arise and the plausible construction of the statute to permit tolling, this Court should adopt this construction.

This Court has regularly relied upon the avoidance canon when interpreting immigration statutes. *See, e.g., St. Cyr*, 533 U.S. at 314 (adopting a limiting construction of IIRIRA to avoid constitutional doubts); *Zadvydas*, 533 U.S. at 699 (adopting a narrowing construction of 8 U.S.C. § 1231(a)(6) "to avoid a serious constitutional threat"); *Id.* at 689 ("We have read significant limitations into other immigration statutes in order to avoid their constitutional invalidation."); *see also Clark*, 543 U.S. at 384 (affirming *Zadvydas*); *Witkovich*, 353 U.S. at 201-202 (finding the "path of constitutional concern ... clear" in construing Section 242(d) of the INA of 1952). The application of the avoidance canon is far more straightforward here than in several prior cases.

A tolling rule, for instance, does not require this Court to ignore seemingly clear indicia of congressional intent in order to avoid constitutional problems—the statutory text is simply silent with respect to the problem at hand. *Compare* Part 1.A.2 *supra* (showing no indication that Congress intended to bar arbitrarily motions to reopen for voluntary departure recipients), *with St. Cyr*, 533 U.S. at 308-314 (finding a lack of clear and express congressional intent to bar the filing of habeas petitions in a statute entitled "Elimination of Custody Review by Habeas Corpus").

Moreover, tolling aliens' voluntary departure periods would not require this Court to cut a statutory limitation from whole cloth. Unlike the six-month limitation period adopted in *Zadvydas*, tolling is an ordinary judicial remedy, *see* Part 1.D *supra*. Indeed, Petitioner's reading of the statute is entirely consistent with the agency's practice of tolling voluntary departure periods pending appeals of immigration judges' decisions to the BIA, *see id.* (citing cases).

"[E]very reasonable construction must be resorted to[ ] in order to save a statute from unconstitutionality." *Gonzales* v. *Carhart*, 127 S. Ct. 1610, 1631 (2007) (internal quotation marks omitted). The tolling rule that Petitioner has urged constitutes a plausible interpretation of the Act. Given the "serious constitutional concerns" of the Government's construction, this Court should read the Act to require tolling of the voluntary departure period upon the filing of a timely motion to reopen.

III. At a Minimum, The Court Should Toll The Voluntary Departure Period In This Case

Even if this Court does not hold that tolling should be permitted for all timely motions to reopen, the Court should toll the voluntary departure period here.

At the time Petitioner filed his motion to reopen, he sought to withdraw his request for voluntary departure—*i.e.*, to waive any benefits and become subject to a final order of removal—but was not permitted to do so. Pet. App. 3-4; *see Young* v. *United States*, 535 U.S. 43, 44, 46-47 (2002) (applying equitable tolling to close statutory "loophole" in the Bankruptcy Code). And he sought a stay, which was never acted on by the agency. Pet. App. 3-4; *see also Sidikhouya*, 407 F.3d at 953-954 (Loken, C.J., dissenting in part and concurring in judgment) (rejecting broad tolling rule; nonetheless, because alien had filed for a stay with motion to reopen, concluding that court should remand to BIA for a ruling on alien's motion to stay).

Moreover, it simply cannot be said that Petitioner knowingly waived his right to a motion to reopen by accepting voluntary departure. *See, e.g.*, *Mendoza-Lopez*, 481 U.S. at 840; *Patino*, 23 I. & N. Dec. at 76 (because of the "profound ramifications" of "relinquish[ing] the parties' opportunity to seek review of the Immigration Judge's ruling," any waiver must be "knowingly

and intelligently made"); *cf.* 8 U.S.C. § 1229c(d)(3) (voluntary departure order shall inform alien of penalties for failure to depart). The immigration judge expressly asked whether Petitioner "reserve[d] appeal," and Petitioner's counsel responded that he did. C.A. App. 167.

In fact, at the time Petitioner filed his motion to reopen and reconsider, the courts of appeals to have considered the question had unanimously concluded that a timely-filed motion to reopen tolls the period of voluntary departure. *See* p. 10 *supra*; *see also Ibarra*, 502 U.S. at 7 ("[w]ithout a clear general rule litigants would be required to guess at their peril"); *Clymore* v. *United States*, 217 F.3d 370, 375-376 (5th Cir. 2000) (applying equitable tolling to a statute of limitations and citing the "unsettled state of the law at the time that [plaintiff] initiated his motion").

Thus, at a very minimum, tolling should apply in this case. In the alternative, Petitioner should be permitted to withdraw his request for voluntary departure and, instead, be subject to a final order of removal.

CONCLUSION

The judgment of the Fifth Circuit should be reversed.

Respectfully submitted.

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SAMSON TAIWO DADA, PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

As formulated by the Court, the question presented is: "Whether the filing of a motion to reopen removal proceedings automatically tolls the period within which an alien must depart the United States under an order granting voluntary departure."

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In the Supreme Court of the United States

No. 06-1181

SAMSON TAIWO DADA, PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-2) is not published in the *Federal Reporter* but is reprinted in 207 Fed. Appx. 425. The decisions of the Board of Immigration Appeals (Pet. App. 3-4, 5-6) and the immigration judge (Pet. App. 7-9) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 28, 2006. The petition for a writ of certiorari was filed on February 26, 2007, and granted on September 25, 2007. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent statutory and regulatory provisions are set forth in the appendix to this brief. App., *infra*, 1a-21a.

STATEMENT

This case concerns the interaction of provisions of the Immigration and Nationality Act (INA or Act), 8 U.S.C. 1101 *et seq.*, and implementing regulations that govern the removal of aliens from the United States, grant the Attorney General discretion to allow an alien voluntarily to depart the United States in lieu of being removed, and provide for an alien to file a motion to reopen a final order of removal. Specifically, the question presented is whether the filing by an alien of a motion to reopen his removal proceedings automatically tolls the congressionally determined period during which the alien must depart the United States under an order granting voluntary departure.

1. The INA governs the conduct of removal proceedings for aliens who are unlawfully in this country. Aliens who are found to be removable may be eligible for a variety of forms of discretionary relief, including asylum, cancellation of removal, and adjustment of status. 8 U.S.C. 1158, 1229b, and 1255 (2000 & Supp. V 2005). An alien who is ordered removed is subject to a bar to admission to the United States, the length of which varies according to the circumstances of the alien's case. 8 U.S.C. 1182(a)(9)(A)(i) and (ii) (establishing inadmissibility periods for aliens who have been "ordered removed" or "departed the United States while an order

of removal was outstanding").[1] In addition, an alien who reenters or attempts to reenter the United States after having been removed is subject to criminal prosecution. 8 U.S.C. 1326.

2. a. The INA provides that the Attorney General "may permit" certain removable aliens "voluntarily to depart the United States at the alien's own expense" in lieu of being removed. 8 U.S.C. 1229c(a)(1) and (b)(1).[2] The INA further provides that the Attorney General "may by regulation limit eligibility for voluntary departure * * * for any class or classes of aliens." 8 U.S.C. 1229c(e).[3] Aliens who are granted voluntary departure and comply with its terms avoid the period of inadmissibility that would otherwise result from departure following entry of an order of removal. 8 C.F.R. 1241.7 ("an

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[1] The inadmissibility period is generally five years if the removal order was entered upon the alien's arrival, or at the end of removal proceedings initiated upon the alien's arrival. 8 U.S.C. 1182(a)(9)(A)(i); see 8 U.S.C. 1225(b)(1)(A). For all other removed aliens, the inadmissibility period is generally ten years. 8 U.S.C. 1182(a)(9)(A)(ii). For all aliens, the inadmissibility period is 20 years "in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony." 8 U.S.C. 1182(a)(9)(A)(i) and (ii). These periods of inadmissibility may be waived. 8 U.S.C. 1182(a)(9)(A)(iii); see *Fernandez-Vargas* v. *Gonzales*, 126 S. Ct. 2422, 2433 n.11 (2006).

[2] By operation of the Homeland Security Act of 2002, Pub. L. No. 107-296, the Secretary of Homeland Security has authority to grant voluntary departure before the commencement of removal proceedings. §§ 402(3), 441, 442, 1512(d), 116 Stat. 2178, 2192, 2193, 2310; see 8 C.F.R. 240.25 (Department of Homeland Security's voluntary departure rules). For ease of reference, and because this case involves a grant of voluntary departure made at the conclusion of removal proceedings, this brief will speak of the Attorney General's authority to grant voluntary departure.

[3] Section 1229c(e) also provides that "[n]o court may review any regulation issued" pursuant to that authorization. 8 U.S.C. 1229c(e).

alien who departed before the expiration of [a] voluntary departure period * * * shall not be considered to [have been] deported or removed"). Voluntary departure also permits aliens "to choose their own destination points, to put their affairs in order without fear of being taken into custody at any time, [and] to avoid the stigma * * * associated with forced removals." *Lopez-Chavez* v. *Ashcroft*, 383 F.3d 650, 651 (7th Cir. 2004).

The requirements for obtaining voluntary departure vary depending on whether an alien seeks it *before* or *at the conclusion of* removal proceedings. In the former situation, the only statutory preconditions are that the alien must not be removable by reason of an aggravated felony conviction or on security or terrorism grounds. 8 U.S.C. 1229c(a)(1). By regulation, an alien who seeks pre-final-order voluntary departure must "[m]ake[] such request prior to or at the master calendar hearing at which the case is initially calendared for a merits hearing," and an immigration judge (IJ) may grant voluntary departure only if the alien concedes removability, makes no additional request for relief (or withdraws any such request previously filed), and "[w]aive[s] appeal of all issues." 8 C.F.R. 1240.26(b)(1)(i). An alien who requests voluntary departure at the conclusion of removal proceedings faces additional requirements. Such an alien must satisfy the statutory preconditions applicable for a pre-hearing grant of voluntary departure, and must also have "been physically present in the United States for a period of at least one year immediately preceding the date the notice to appear was served," have been "a person of good moral character for at least 5 years," and have "established by clear and convincing evidence that [he] has the means to depart the United States and intends to do so." 8 U.S.C. 1229c(b)(1).

b. The INA and the Attorney General's regulations contain a number of provisions designed to ensure that aliens who have been granted the privilege of voluntary departure actually depart in a timely fashion. The Act strictly limits the period for which a grant of voluntary departure may last. For aliens who are granted that privilege before the conclusion of removal proceedings, "permission to depart voluntarily * * * shall not be valid for a period exceeding 120 days." 8 U.S.C. 1229c(a)(2)(A). The time limit is even shorter for aliens granted voluntary departure at the conclusion of removal proceedings: "Permission to depart voluntarily * * * shall not be valid for a period exceeding 60 days." 8 U.S.C. 1229c(b)(2). Those statutory time limits are outer limits. The IJ or Board of Immigration Appeals (BIA or Board) can specify a shorter period. The regulations further provide that "[a]uthority to extend the time within which to depart voluntarily specified initially by an immigration judge or the Board is only within the jurisdiction of" certain specified officials of the Department of Homeland Security (DHS). 8 C.F.R. 1240.26(f). The regulations expressly provide, however, that "[i]n no event can the total period of time, including an extension, exceed 120 days or 60 days as set forth in [8 U.S.C. 1229c]." *Ibid.*

The INA also provides that aliens who request voluntary departure at the conclusion of their removal proceedings "shall be required to post a voluntary departure bond." 8 U.S.C. 1229c(b)(3); see 8 U.S.C. 1229c(a)(3) (stating that the Attorney General "may require" such a bond from aliens granted voluntary departure prior to the conclusion of removal proceedings). The bond must be "in an amount necessary to ensure that the alien will depart" and may be returned only

"upon proof that the alien has departed the United States within the time specified." 8 U.S.C. 1229c(b)(3).

c. The INA and the Attorney General's regulations also impose a number of consequences if a removable alien who is granted voluntary departure fails to depart within the authorized time. First, such an alien forfeits any bond he was required to post as a condition to being granted voluntary departure.

Second, an IJ who grants voluntary departure must "also enter an alternate order [of] removal." 8 C.F.R. 1240.26(d). If the alien does not file a timely administrative appeal with the BIA—which must be filed within 30 days of the IJ's decision, 8 C.F.R. 1003.38(b)—the IJ's alternate order of removal "become[s] final" "upon overstay of the voluntary departure period" provided in the IJ's order. 8 C.F.R. 1241.1(f). If a timely appeal is filed and the Board finds the alien removable, it may "reinstate[]" the voluntary departure period granted by the IJ or "grant[]" such a period itself if the IJ has not done so. *Ibid.* Again, the alternate removal order becomes final "upon overstay of the voluntary departure period" granted or reinstated by the Board. *Ibid.*; accord 8 U.S.C. 1101(a)(47)(B) (a deportation order "shall become final upon the earlier of—(i) a determination by the Board of Immigration Appeals affirming such order; or (ii) the expiration of the period in which the alien is permitted to seek review of such order by the [BIA]."). Whether ordered by the IJ or the BIA, if the voluntary departure period expires and the alternate order of removal becomes final, the alien is subject to a period of inadmissibility after he departs or is removed from the United States and to criminal prosecution if he seeks to reenter. See pp. 2-3 & note 1, *supra*.

Third, the INA imposes additional consequences on an alien who "voluntarily fails to depart the United States within the time period specified." 8 U.S.C. 1229c(d)(1) (Supp. V 2005).[4] In addition to being subject to a civil fine of between $1000 and $5000, such an alien is rendered "ineligible, for a period of 10 years," to receive certain forms of discretionary relief, including cancellation of removal, adjustment of status, and a subsequent grant of voluntary departure. 8 U.S.C. 1229c(d)(1)(A) and (B) (Supp. V 2005).[5] The INA specifically requires that "[t]he order permitting an alien to depart voluntarily shall inform the alien of the penalties under this subsection." 8 U.S.C. 1229c(d)(3) (Supp. V 2005).

d. Finally, the INA contains a number of provisions addressing judicial review of voluntary departure orders and the alternate orders of removal that accompany them. Section 1229c(f) provides that "[n]o court shall have jurisdiction over an appeal from denial of a request

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[4] After the BIA's grant of voluntary departure in this case, Congress enacted the Violence Against Women and Department of Justice Reauthorization Act of 2005 (Amendment), Pub. L. No. 109-162, 119 Stat. 2960. Section 812 of the Amendment, 119 Stat. 3057, amended 8 U.S.C. 1229c(d) by subdividing it into three subparts, one of which (subsection (d)(2)) contains a new exception to the statutory penalties for failure to depart within the time specified for certain battered spouses and children. Because the petition for a writ of certiorari, the brief in opposition, and petitioner's brief on the merits all cite the post-Amendment version of Section 1229c(d), this brief does so as well. Both the pre- and post-Amendment versions are reproduced in the appendix to this brief. App., *infra*, 12a-13a (post-Amendment); 14a (pre-Amendment).

[5] An alien who overstays a period of voluntary departure is not, however, rendered ineligible for asylum under 8 U.S.C. 1158 (2000 & Supp. V 2005) or withholding of removal under 8 U.S.C. 1231(b)(3).

for an order of voluntary departure." 8 U.S.C. 1229c(f). That same provision also bars a court from "order[ing] a stay of an alien's removal pending consideration of any claim with respect to voluntary departure." *Ibid.* Compare 8 U.S.C. 1252(b)(3) (authorizing reviewing court to "stay removal" pending decision on petition for judicial review). In 1996, Congress repealed a provision that had barred courts from reviewing final deportation orders of aliens who had departed from the United States. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, § 306(b), 110 Stat. 3009-612 (repealing 8 U.S.C. 1105a(c) (1994)); *Stone* v. *INS*, 514 U.S. 386, 399 (1995). As a result, under current practice, an alien can voluntarily depart the United States without forfeiting his ability to obtain judicial review of the underlying alternate removal order. *Ngarurih* v. *Ashcroft*, 371 F.3d 182, 192 (4th Cir. 2004).

3. The INA and the Attorney General's regulations provide for the filing of a motion to reopen proceedings after a final decision has been rendered by an IJ or the Board. 8 U.S.C. 1229a(c)(7)(B) (Supp. V 2005); 8 C.F.R. 1003.23(b)(3) (IJ); 8 C.F.R. 1003.2(c) (BIA). The purpose of a motion to reopen is to present "new facts" that may bear on an alien's eligibility for relief. 8 U.S.C. 1229a(c)(7)(B) (Supp. V 2005); see 8 C.F.R. 1003.2(c)(1) (stating that motions to reopen filed with the BIA must identify evidence that "could not have been discovered or presented at the former hearing" or seek discretionary relief "on the basis of circumstances that have arisen subsequent to the hearing"). An alien "may file one motion to reopen." 8 U.S.C. 1229a(c)(7)(A) (Supp. V 2005). And, subject to three specifically enumerated exceptions that are inapplicable here, 8 U.S.C. 1229a(c)(7)(C)(ii)-(iv) (Supp. V 2005), any motion to reopen "shall be filed

within 90 days of the date of entry of a final administrative order of removal," 8 U.S.C. 1229a(c)(7)(C)(i) (Supp. V 2005). Those statutory limitations are essentially the same as limitations that had been adopted by the Attorney General by regulation five months earlier. 61 Fed. Reg. 18,905 (1996), adopting 8 C.F.R. 3.2(b)(2).[6]

The INA establishes no standards for granting a motion to reopen. The regulations state that "[t]he decision to grant or deny a motion to reopen * * * is within the discretion of the Board" and that it may "deny a motion to reopen even if the party moving has made out a *prima facie* case for relief." 8 C.F.R. 1003.2(a); see *INS* v. *Phinpathya*, 464 U.S. 183, 188 n.6 (1984) (whether to grant a motion to reopen "is entirely within the BIA's discretion"). Among other restrictions, an alien who departs the United States may not file a motion to reopen "subsequent to his or her departure," and an alien's departure "after the filing of a motion to reopen * * * shall constitute a withdrawal of such motion." 8 C.F.R. 1003.2(d).

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[6] Before 1990, motions to reopen were governed entirely by regulation. See 8 C.F.R. 3.2 (1989). In 1990, Congress directed the Attorney General to place limits on the number of motions to reopen an alien could file, specify a maximum time period for filing such motions, and submit a report concerning "abuses associated with the failure of aliens to consolidate requests for discretionary relief before immigration judges at the first hearing on the merits." Immigration Act of 1990, Pub. L. No. 101-649, § 545(c) and (d), 104 Stat. 5065, 5066. Regulations implementing those directives were proposed in 1994, 59 Fed. Reg. 29,386, and again in 1995, 60 Fed. Reg. 24,574 (extending the filing period from 20 days to 90 days), and were promulgated in final form on April 29, 1996, 61 Fed. Reg. 18,900. On September 30, 1996, Congress enacted the present statutory time and number limits on motions to reopen. IIRIRA § 304(a), 110 Stat. 3009-593.

The regulations further provide that, with certain enumerated exceptions inapplicable here, "the filing of a motion to reopen * * * shall not stay the execution of any decision made in the case." 8 C.F.R. 1003.2(f). With particular respect to voluntary departure, the regulations state if either the IJ or the BIA grants reopening, either may then "reinstate" an otherwise expired voluntary departure period, but only "if reopening was granted prior to the expiration of the original period of voluntary departure." 8 C.F.R. 1240.26(h). Upon such a reinstatement, "[i]n no event can the total period of time, including any extensions, exceed" the statutory 120-day and 60-day limitations. *Ibid.*

4. a. Petitioner is a citizen of Nigeria who entered the United States as a non-immigrant visitor in April 1998. Pet. App. 7. Petitioner remained in the United States beyond the authorized period, which expired on August 31, 1998. *Ibid.*

In 1999, petitioner married a United States citizen, who filed an I-130 (immediate relative) visa petition on his behalf. Pet. App. 8; Admin. R. 55 (A.R.). On February 7, 2003, the Immigration and Naturalization Service (INS) denied the visa petition, deeming it abandoned because petitioner's wife had failed to submit required documentation. A.R. 176.

On January 4, 2004, DHS charged petitioner with being removable. Pet. App. 7-8. On March 17, 2004, petitioner's wife filed a second immediate relative visa petition. A.R. 169. On May 13, 2004, the IJ granted petitioner's request for a continuance to permit his attorney to prepare for the removal hearing. Pet. App. 8.

On September 8, 2004, a hearing was held before an IJ. A.R. 162-168 (transcript of hearing); Pet. App. 7-9 (oral decision by IJ). After petitioner "concede[d]

removability," the IJ found "that the charge [was] sustained" and that petitioner was "removable as charged." A.R. 163. Petitioner requested a further continuance to permi' resolution of his wife's second I-130 visa petition. A.R. 163-164. The government opposed that request, noting that petitioner "has had sufficient opportunity * * * to pursue a previous I-130." A.R. 164. In the alternative, petitioner "ask[ed] for voluntary departure at the conclusion of [the] proceeding," and stated under oath that he "would * * * leave voluntarily" if that request were granted. A.R. 165-166. The IJ denied petitioner's motion for a continuance, but granted his "request for voluntary departure." Pet. App. 8-9. As required by 8 C.F.R. 1240.26(d), the IJ's decision further provided that if petitioner did not depart within the time allowed, "the voluntary departure order will become an order of removal" and petitioner would be removed to Nigeria. Pet. App. 9. The IJ also informed petitioner that if he "fail[ed] to depart on or before the voluntary departure date," he would "become ineligible [for] * * * cancellation of removal, adjustment of status, and voluntary departure." A.R. 166-167.

Petitioner filed an administrative appeal to the BIA, which rendered the IJ's order non-final and therefore suspended the voluntary departure period and the alternate order of removal pending appeal. 8 U.S.C. 1101(a)(47)(B)(i) (order "become[s] final" upon affirmance by the BIA or expiration of time for seeking BIA review); 8 U.S.C. 1229c(b)(1) (authorizing the Attorney General to permit voluntary departure "at the conclusion of a [removal] proceeding under section 1229a"). On November 4, 2005, the BIA affirmed the IJ's decision. Pet. App. 5-6. "Pursuant to the Immigration Judge's order," the Board stated that petitioner

would be "permitted to voluntarily depart from the United States * * * within 30 days from the date of this order or any extension beyond that time as may be granted by [DHS]." *Id.* at 5. The BIA's order further provided that if petitioner "fail[ed] to depart the United States within the time period specified, or any extensions granted by the DHS," he would be subject to a civil penalty and would "be ineligible for a period of 10 years for any further relief" under various provisions of the Act, specifically including those authorizing adjustment of status and voluntary departure. *Id.* at 5-6 (citing, *inter alia*, Sections 240A, 240B, and 245 of the INA (8 U.S.C. 1229b, 1229c, and 1255)).

The 30-day voluntary departure period specified in the BIA's order was scheduled to expire on December 4, 2005, a Sunday. Petitioner did not seek an extension of that period from DHS.[7] Nor did he depart. Instead, on Friday, December 2, 2005, petitioner filed a motion with the BIA asking it to reopen his removal proceedings and remand his case to the IJ to permit him to seek adjustment of status based on his wife's pending I-130 visa petition. A.R. 3; see A.R. 8-21. In his motion to reopen, petitioner purported to "withdraw his request for voluntary departure" and "instead accept[] an order of deportation." A.R. 10.

On February 8, 2006, the Board denied petitioner's motion to reopen. Pet. App. 3-4. The BIA explained that, under 8 U.S.C. 1229c(d) (Supp. V 2005), "an alien who fails to depart following a grant of voluntary departure * * * is statutorily barred from applying for certain forms of discretionary relief." Pet. App. 3-4. As a

[7] Given the 60-day statutory cap on a period of voluntary departure allowed at the conclusion of removal proceedings, 8 U.S.C. 1229c(b)(2), any such extension would have been limited to an additional 30 days.

result, because petitioner "remain[ed] in the United States after the scheduled date of departure," he was ineligible for adjustment of status. *Id.* at 4.

b. The court of appeals affirmed in an unpublished, per curiam opinion. Pet. App. 1-2. Citing its decision in *Banda-Ortiz* v. *Gonzales*, 445 F.3d 387 (5th Cir. 2006), cert. denied, 127 S. Ct. 1874 (2007), the court held that the "BIA's interpretation of the applicable statutes rendering [petitioner] ineligible [for adjustment of status] was reasonable,"[8] and that petitioner had "failed to show that the BIA abused its discretion by denying his motion to reopen." Pet. App. 2.

In *Banda-Ortiz*, the Fifth Circuit "declin[ed] to read into 8 U.S.C. § 1229c(d) the requirement that the BIA automatically toll an alien's voluntary departure period during the pendency of a motion to reopen." 445 F.3d at 391. The court described the grant of voluntary departure as "the result of an agreed-upon exchange of benefits between an alien and the [g]overnment," under which the alien "gain[s] access to the numerous benefits that voluntary departure provides" in exchange for a representation that he will make "a quick departure at no cost to the government." *Id.* at 389-390. "But if the alien does not depart promptly, so that the [government] becomes involved in further and more costly procedures by his attempts to continue his illegal stay here," it reasoned, "the original benefit to the [government] is lost." *Id.* at 390 (quoting *Ballenilla-Gonzalez* v. *INS*, 546 F.2d 515, 521 (2d Cir. 1976), cert. denied, 434 U.S. 819 (1977)). The court also determined that a contrary rule

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[8] The court of appeals also concluded that "[t]he IJ did not abuse its discretion by denying [petitioner's] request for a continuance" during the original removal proceedings. Pet. App. 2. Petitioner does not seek review of that holding here. Pet. i.

would be "in tension with, if not opposed to," the congressionally imposed limits "on the length of and authority to extend voluntary departure." *Ibid.* While acknowledging that Congress has "authorized aliens to file a motion to reopen, and did not exclude aliens who elect voluntary departure from its application," the court determined that "[t]he BIA has reasonably interpreted the governing statutes * * * to permit the filing and resolution of a motion to reopen, so long as it does not interfere with the agreed upon voluntary departure date or the Government's interest in the finality of an alien's voluntary departure." *Id.* at 391 (citation omitted).

SUMMARY OF ARGUMENT

The filing of a motion to reopen removal proceedings does not automatically suspend an alien's obligation to depart from the United States within the time specified in an order granting voluntary departure. Voluntary departure is an agreed-upon method of resolving removal proceedings that provides tangible benefits to both aliens and the government. Petitioner's approach would subvert that exchange by permitting every alien granted voluntary departure the unilateral ability to alter its substantive terms, and result in routine violation of congressionally imposed limits on grants of voluntary departure.

A. Congress has expressly directed that, at the conclusion of removal proceedings, "[p]ermission to depart voluntarily * * * shall not be valid for a period exceeding 60 days," 8 U.S.C. 1229c(b)(2), and regulations carefully limit how, and to what extent, an initial period of voluntary departure period may be extended. Petitioner's proposal would also disrupt other aspects of the statutory scheme, including two provisions that are trig-

gered based on whether an alien departs within "the time specified," 8 U.S.C. 1229c(b)(3), or "the time period specified," 8 U.S.C. 1229c(d)(1) (Supp. V 2005). The issue here does not truly involve "tolling" at all. Moreover, the statutory time limit on permission to depart voluntarily is a substantive limitation on the availability of a congressionally created privilege, not a limitations period designed to encourage aliens to assert legal claims in a timely fashion. What petitioner is actually seeking is an automatic *suspension* or *extension* of the time during which his permission to depart voluntarily remained valid and a *stay* of the alternate order of removal that would otherwise have become final upon its expiration. While those are the consequences of appeal to the BIA, once the BIA has ruled, the INA and implementing regulations make clear that neither consequence flows from the filing of a motion to reopen.

B. The statutory history of Section 1229c confirms that Congress did not intend for the filing of a motion to reopen to extend a voluntary departure period. Since 1990, Congress has repeatedly acted to limit the Attorney General's authority in granting voluntary departure, impose mandatory consequences for an alien's failure to depart within the time specified, and narrow exceptions to such limitations and consequences. That history certainly reveals no intent to disturb the BIA's pre-IIRIRA conclusion that the filing of a motion to reopen does not immunize an alien from the consequences of failing to depart within the time specified in an order granting voluntary departure.

C. There is no conflict between the provisions governing voluntary departure and those governing motions to reopen. Having volunteered for a discretionary benefit based on representations that he "has the means to

depart the United States and intends to do so," 8 U.S.C. 1229c(b)(1)(D), an alien must abide by voluntary departure's terms, including the requirement that he depart within the time specified. Although that obligation may often limit an alien's opportunity to obtain some other form of discretionary relief via a motion to reopen, it is a commonplace that a party's choice to seek one remedy may sometimes foreclose his ability to obtain another. In addition, the argument that an alien's statutory option to file a single motion to reopen overrides the strict statutory limits on the duration of a period of voluntary departure is inconsistent with the disfavor with which motions to reopen are viewed. The provision providing for a single motion to reopen was designed to *limit* motions to reopen, not to give such motions an exalted status that would trump other statutory limits. Such an automatic stay via a motion to reopen would also be inconsistent with the fact that the filing of a petition for judicial review does not by its own force extend a period of voluntary departure.

D. Although resort to principles of deference is unnecessary to uphold the BIA's conclusion in this case, the Attorney General's longstanding interpretation of the INA provides further reason for rejecting petitioner's proposed construction. In 1996, the BIA concluded, in a precedential en banc decision, that the filing of a motion to reopen removal proceedings neither extends the time for voluntary departure nor immunizes an alien from the consequences of failing to depart within the time specified. Neither subsequent legislation nor subsequent regulations indicate any intent to disturb that holding, and the BIA has continued to apply it. That practice is consistent with provisions in the post-1996 regulations stating that the filing of a motion

to reopen does not stay the execution of *any* decision made in a given case, and that permit an IJ or the BIA to reinstate a voluntary departure period, but only if a motion to reopen was *granted* before the expiration of the voluntary departure period. Finally, the Attorney General has recently provided a detailed explanation of why his "interpretation of the [INA] and the existing regulations is that the filing of a motion to reconsider or reopen * * * does not automatically toll the voluntary departure period." 72 Fed. Reg. 67,678 (2007).

E. The Attorney General's interpretation of the statute and regulations creates no constitutional difficulties. Petitioner does not claim that he had a constitutionally cognizable interest in the *granting* of his motion to reopen, and the decision whether to reopen proceedings "is entirely within BIA's discretion," *INS* v. *Phinpathya*, 464 U.S. 183, 188 n.6 (1984). Nor does the BIA's decision give rise to any equal protection concerns: Petitioner is not a member of a suspect class, and it is entirely rational to treat aliens who seek and then violate the terms of a grant of voluntary departure differently from those who were ineligible for, or did not seek, such relief.

ARGUMENT

THE FILING OF A MOTION TO REOPEN REMOVAL PROCEEDINGS DOES NOT EXCUSE AN ALIEN'S FAILURE TO DEPART WITHIN THE TIME SPECIFIED IN AN ORDER GRANTING VOLUNTARY DEPARTURE

The INA grants the Attorney General discretion to allow an alien to depart the United States voluntarily and at his own expense, in lieu of being ordered removed and physically deported by the government. Because that means of departing is "voluntary" on the alien's part and discretionary with the Attorney General, voluntary departure represents an agreed-upon method of definitively resolving removal proceedings. In appropriate situations, voluntary departure provides tangible benefits to both sides: The alien gains the ability to control the circumstances of his departure and exemption from a statutory bar that would otherwise inhibit his return, and the government is spared further time and effort in effectuating the alien's removal. But even though voluntary departure reflects an *agreed-upon* resolution of removal issues, and is subject to a strict statutory time limit, petitioner contends that an alien may automatically extend the period within which to depart through the *unilateral* act of filing a motion to reopen the proceedings. Such a regime would subvert Congress's carefully crafted rules governing voluntary departure, and invite strategic behavior by aliens seeking to extend their unlawful stay in the United States as long as possible.

A. The Text Of Section 1229c Expressly Limits How Long A Discretionary Grant Of Voluntary Departure May Last

The INA provides that the Attorney General "may permit an alien voluntarily to depart the United States" at the conclusion of removal proceedings if certain conditions are met. 8 U.S.C. 1229c(b)(1); see 8 C.F.R. 1240.26(c)(1). The terms of Section 1229c and the regulations that implement it demonstrate that the filing of a motion to reopen neither extends the time during which permission to depart voluntarily remains valid, nor immunizes the alien from the consequences of failing to depart within the specified time.

Most obviously, petitioner's proposed rule would result in widespread and routine violation of Congress's express directive that "[p]ermission to depart voluntarily * * * shall not be valid for a period exceeding 60 days. 8 U.S.C. 1229c(b)(2). It would also be contrary to the regulations' express provision that any "exten[sion of] the time within which to depart voluntarily specified initially by an immigration judge or the Board" requires an affirmative act by specified DHS officials, and that even then the total time allowed may not exceed the statutory 60-day maximum. 8 C.F.R. 1240.26(f).

Petitioner's proposed rule would disrupt other aspects of the statutory scheme as well. In two different provisions, Congress has prescribed consequences that will attach if the alien does not depart the United States within "the time specified," 8 U.S.C. 1229c(b)(3) (alien's ability to obtain return of voluntary departure bond), or "the time period specified," 8 U.S.C. 1229c(d)(1) (Supp. V 2005) (consequences for "voluntarily fail[ing] to depart"). The words "time specified" and "time period

specified" clearly refer to the period of voluntary departure set forth in the order granting or extending it. Neither subsection contains any express exceptions, and neither can reasonably be read to contemplate unstated exceptions. Indeed, Congress's use of the definite article—*i.e.*, "*the* time specified"—underscores Congress's evident intent that the period may not be extended in an open-ended fashion that is impossible to calculate *ex ante*.

Seeking to resist—and, indeed, capitalize on—the clarity of the statutory language, petitioner asserts (Br. 18 n.6) that "[t]olling, by its very nature, becomes relevant because of seemingly inflexible time limits and thus arises in the context of language that, on its face, would appear to preclude it." That ambitious effort to benefit from the clarity with which the relevant language appears to foreclose his argument is unavailing.

Most fundamentally, this case does not involve "tolling" as it is traditionally understood. The concept of "tolling" pertains to suspension of the otherwise-applicable time within which a person may assert legal claims or rights before the relevant tribunal. *Young* v. *United States*, 535 U.S. 43, 49-50 (2002). The 60-day cap is not "a limitations period" of that sort. *Id.* at 47. A removable alien has no *right* to voluntary departure to begin with. See, *e.g.*, *Garcia-Mateo* v. *Keisler*, 503 F.3d 698, 700 (8th Cir. 2007); *Patel* v. *Gonzales*, 470 F.3d 216, 220 (6th Cir. 2006); *Tovar-Landin* v. *Ashcroft*, 361 F.3d 1164, 1167 (9th Cir. 2004). And, in any event, petitioner had already been granted permission to depart voluntarily, so the 60-day period did not operate as a period within which he could seek that relief from the BIA. Rather, the 60-day period in Section 1229c(b)(2) was one of the "substantive limitations," *United States* v.

Brockamp, 519 U.S. 347, 352 (1997), on the permission he was granted. See 8 U.S.C. 1229c(b)(2) ("Permission to depart voluntarily * * * shall not be valid for a period exceeding 60 days.").

What petitioner actually claims therefore is an extension—indeed, an *automatic* and *unilateral* extension —of one of the statutory terms of the substantive immigration relief he was granted as a matter of discretion, see *Alimi* v. *Ashcroft*, 391 F.3d 888, 891 (7th Cir. 2004), and a resulting *stay* of the alternate order of removal that would otherwise have become final upon expiration of the voluntary departure period, 8 C.F.R. 1241.1(f). Once the issue is properly framed, it is clear that it would be extraordinary for one party's unilateral act of filing a motion to reopen an already concluded proceeding to trigger an automatic alteration of the substantive terms of a benefit the other party had conferred as a matter of grace, as well as an automatic stay in the moving party's favor of adverse consequences that would otherwise follow as a matter of law. While such a substantive alteration could be provided by statute, such an alteration of the terms of the bargain outlined in the statute is something well beyond an application of ordinary principles of equitable tolling.

To the extent that the proposed analogy to equitable tolling sheds any useful light, moreover, the analogy cuts strongly against petitioner's position. First, equitable tolling principles typically apply to statutes of limitations for filing a claim in the first instance. But whether or not equitable considerations might influence enforcement of deadlines for seeking relief as an initial matter, the situation changes when someone has sought relief and either been denied it or granted it subject to certain limitations. In those circumstances, the onus on the

party seeking additional relief is generally to comply with strictly-enforced time limits and affirmatively seek and obtain interim relief.

More broadly, whether equitable tolling of a limitations period is available under a given statutory scheme is ultimately a matter of legislative intent. *Brockamp*, 519 U.S. at 350. As demonstrated above, permitting an alien unilaterally to extend the statutory period during which permission to depart voluntarily remains valid—or permitting a reviewing court to impose such a rule on the Attorney General—would be "fundamentally inconsistent" with both the specific text and the statutory scheme of Section 1229c. *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 363 (1991); see *United States* v. *Beggerly*, 524 U.S. 38, 48 (1998) ("Equitable tolling is not permissible where it is inconsistent with the text of the relevant statute."); see also pp. 23-28, *infra* (explaining that the manner in which Section 1229c has evolved confirms that Congress did not intend to allow permission to depart voluntarily to extend beyond the time specified).

In addition, petitioner's position is fundamentally inconsistent with the very nature of equitable tolling. Courts have "typically extended equitable relief only sparingly." *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 96 (1990). Petitioner's approach, in contrast, would confer upon every alien who has been granted voluntary departure for a limited period an entitlement to obtain an extension of that period, and thus make "tolling" the rule rather than the exception.

Finally, even where tolling of a limitations period is permitted at all, it will be invoked only to enable a party to exercise the rights governed by that period—and only if the party who seeks tolling demonstrates "(1) that he

has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way," *Pace* v. *DiGuglielmo*, 544 U.S. 408, 418 (2005). Here, petitioner makes no claim that he was "pursuing * * * diligently" all available means to depart the United States voluntarily within the 60 days allowed, but that some "extraordinary circumstance stood in his way" of doing so." *Ibid.*[9] To the contrary, petitioner decided that he did not want to depart the United States voluntarily after all, at least not under the 30-day deadline on which the grant of permission in his particular case was conditioned. The fact that petitioner decided to pursue another course by filing a motion to reopen, but at the same time wanted to keep his option open to depart voluntarily later on if that option failed, is scarcely comparable to the compelling equitable circumstances in which tolling of a true statute of limitations has been allowed.

B. The Statutory History Of The INA's Voluntary Departure Provisions Confirms That Congress Did Not Intend For The Filing Of A Motion To Reopen To Excuse An Alien's Failure To Depart Within The Prescribed Period

Until 1990, decisions about whether and for how long to grant voluntary departure were left largely to the discretion of the Attorney General and those acting on his behalf. Since then, Congress has repeatedly acted to limit the Attorney General's authority in granting and extending periods of voluntary departure, to impose mandatory consequences for an alien's failure to depart within the time specified, and to narrow the exceptions

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[9] At one time, the INA excused an alien who failed to depart in the time specified if the failure to do so was "because of exceptional circumstances." 8 U.S.C. 1252b(e)(2)(A) (Supp. III 1991). That provision was deleted in 1996. See p. 24, *infra*.

to such limitations and consequences. That statutory history is irreconcilable with petitioner's assertion that Congress intended to permit any alien who has previously been granted voluntary departure to obtain a unilateral extension of unspecified duration and immunity from the consequences that would otherwise flow from his failure to depart within the time specified.

1. In the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 5064 (1990 Act), Congress imposed a five-year period of ineligibility for certain enumerated forms of discretionary relief for "any alien allowed to depart voluntarily * * * who remain[ed] in the United States after the scheduled date of departure." § 545, 104 Stat. 5064 (8 U.S.C. 1252b(e)(2)(A) (Supp. III 1991)). That provision, however, contained an exception for any alien whose failure to depart within the specified time was "because of exceptional circumstances." *Ibid.*

In 1996, IIRIRA imposed substantial new restrictions on voluntary departure. First, Congress established strict limits on how long the permission to depart voluntarily remains valid, including the 60-day limit now applicable to grants made at the conclusion of removal proceedings. Pub. L. No. 104-208, § 304(a)(3), 110 Stat. 3009-596, 3009-597 (8 U.S.C. 1229c(a)(2) and (b)(2) (Supp. II 1996)).[10] Second, IIRIRA eliminated the "exceptional circumstances" exception, § 308(b)(6), 110 Stat. 3009-615; increased the ineligibility period from

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[10] In Section 2 of the International Patient Act of 2000, Pub. L. No. 106-406, 114 Stat. 1755-1757 (8 U.S.C. 1229c(a)(2)(B)), Congress established a three-year pilot program that permitted the Attorney General to waive the 120-day limit on grants of voluntary departure made before the conclusion of removal proceedings in certain cases where an otherwise removable alien was receiving medical treatment in the United States. That program expired in 2003. *Ibid.*

five to ten years for an alien who "fails voluntarily to depart the United States within the time period specified," § 304(a)(3), 110 Stat. 3009-597 (8 U.S.C. 1229c(d)); and mandated a civil penalty of between $1000 and $5000 for an alien who fails to depart within the time specified, *ibid.* Finally, Congress enacted specific prohibitions on judicial review of voluntary departure orders, declaring that "[n]o court shall have jurisdiction" over either "any judgment regarding the granting of relief under [the voluntary departure provision]," § 306(a)(2), 110 Stat. 3009-607 (8 U.S.C. 1252(a)(2)(B)(i)), or "an appeal from denial of a request for an order of voluntary departure," § 304(a)(3), 110 Stat. 3009-597 (8 U.S.C. 1229c(f)). And Congress also specifically provided: "[N]or shall any court order a stay of an alien's removal pending consideration of any claim with respect to voluntary departure." *Ibid.*

On January 5, 2006, Congress enacted the Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960. In that legislation, Congress reorganized Section 1229c(d) and carved out a new exception to its restrictions on relief for certain battered spouses or children who can demonstrate that "extreme cruelty or battery was at least one central reason for the alien's overstaying the grant of voluntary departure." § 812, 119 Stat. 3057 (8 U.S.C. 1229c(d)(2) (Supp V 2005)). But no other exception has been enacted.

2. The manner in which Section 1229c has evolved is significant for three reasons. First, the simultaneous adoption of strict time limits on periods of voluntary departure and stringent prohibitions of judicial review of decisions refusing to grant such relief and judicial stays of removal pending consideration of a request for

voluntary departure demonstrate that Congress did not intend for courts to invoke judicially-crafted tolling notions to impose extensions of the period allowed by Congress and the Attorney General.

Second, Congress's creation (in 1990), repeal (in 1996), and then creation (in 2006) of carefully drawn exceptions to the increasingly strict consequences for an alien who fails to depart within the specified period show that Congress did not intend for courts to excuse an alien's failure to depart within "the time period specified" (8 U.S.C. 1229c(d)(1) (Supp. V 2005)) whenever an alien files a motion to reopen already concluded removal proceedings. See *TRW Inc.* v. *Andrews*, 534 U.S. 19, 28 (2001) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.") (internal quotation marks and citation omitted).

Third, and "[f]rom an even more fundamental standpoint, the policies of the tolling rule [that petitioner proposes] are at odds with Congress' policy in adopting" substantial restrictions on grants of voluntary departure and enhanced consequences for an alien's failure to comply with its terms. *Stone* v. *INS*, 514 U.S. 386, 399 (1995); see *id.* at 397 ("When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect."). As with the portion of the INA that this Court construed in *Stone*, see p. 35, *infra*, the essential purpose of IIRIRA's amendments to the voluntary departure provisions was "to abbreviate the [removal] process . . . in order to frustrate certain practices . . . whereby persons subject to deportation were forestalling departure by dilatory tactics." *Stone*, 514 U.S. at 399 (quoting *Foti* v. *INS*, 375 U.S. 217, 224

(1963)). Adoption of petitioner's proposal would seriously frustrate those purposes by permitting any alien who has already promised to depart the United States within a limited and specified time to obtain an automatic extension simply by filing a motion to reopen the very removal proceedings that the grant of voluntary departure was intended to conclude.

Petitioner insists (Br. 19) that "there is no indication that Congress even considered the tolling question at issue here" when it enacted IIRIRA. Even if that assertion is true, it favors the government, not petitioner. In July 1996, two-and-a-half months before IIRIRA was enacted, 110 Stat. 3009-546, the BIA issued an en banc precedential decision holding that the filing of a motion to reopen neither tolls the running of a previously granted voluntary departure period, nor excuses an alien who fails to depart within the specified time from the consequences prescribed by law. *In re Shaar*, 21 I. & N. Dec. 541, 547-548 (B.I.A. 1996), petition for review denied, 141 F.3d 953 (9th Cir. 1998). The Board described the contrary position as "find[ing] no support in the federal regulations or prior case law," *id.* at 547, and it quoted its own 1985 statement that "the mere filing of a motion to reopen * * * does not allow the alien to remain in the United States pending the decision on his * * * motion," *id.* at 548 (quoting *In re Tuakoi*, 19 I. & N. Dec. 341, 349 (B.I.A. 1985)). Congress is "presume[d]" to have been aware of the Board's longstanding and recently reiterated view when it enacted IIRIRA. *Stone*, 514 U.S. at 398. Accordingly, the fact that neither the statutory text nor any legislative history identified by petitioner even remotely suggests an intent to disturb *Shaar*'s construction of pre-IIRIRA law further undercuts petitioner's position. This is all

the more so given that the entire thrust of IIRIRA's provisions regarding voluntary departure was to *limit* the availability of that form of relief and to make the consequences an alien's failure to comply with the requirements of voluntary departure *more*, not less, strict. See pp. 24-25, *supra*.

C. There Is No Conflict Between The Restrictions On Permission To Depart Voluntarily And The Provisions Allowing The Filing Of Motions To Reopen

The centerpiece of petitioner's argument—and that of the courts of appeals that have held that the mere act of filing a motion to reopen automatically extends the statutory period during which permission to depart voluntarily remains valid—is that such a rule is necessary in order to prevent an asserted conflict between the provisions governing voluntary departure and those addressing motions to reopen. Pet. Br. 12-23; *Ugokwe* v. *United States Att'y Gen.*, 453 F.3d 1325, 1330-1331 (11th Cir. 2006); *Sidikhouya* v. *Gonzales*, 407 F.3d 950, 953 (8th Cir. 2005); *Azarte* v. *Ashcroft*, 394 F.3d 1278, 1289 (9th Cir. 2005). The BIA, the argument goes, will not ordinarily have resolved a motion to reopen before the voluntary departure period expires. As a result, aliens who have been granted voluntary departure but still wish to file a motion to reopen will face a choice between departing the country and losing their ability to obtain adjudication of their motion to reopen, see 8 C.F.R. 1003.2(d) (providing that an alien who departs the United States may not file a motion to reopen "subsequent to his or her departure," and that departure "after the filing of a motion to reopen * * * shall constitute a withdrawal of such motion"), or remaining in the

country and suffering the consequences of failing to depart within the time specified.

These arguments all suffer from the same fundamental flaw: They ignore the fact that voluntary departure is *entirely voluntary*. An IJ may not grant voluntary departure unless the alien requests it. 8 C.F.R. 1240.26(b)(1)(i)(A) (grants of voluntary departure prior to the conclusion of removal proceedings); 1240.26(c)(1)(iv) (at the conclusion of removal proceedings). In addition, an alien (like petitioner) who requests voluntary departure at the conclusion of removal proceedings must "establish[] by clear and convincing evidence that the alien has the means to depart the United States *and intends to do so*," 8 U.S.C. 1229c(b)(1)(D) (emphasis added). If an alien who is eligible for a grant of voluntary departure concludes that it may prove adverse to his interests, he may simply decline to seek voluntary departure in the first place.

Having elected to seek voluntary departure, however, such an alien must "take[] all the benefits and all the burdens of the statute together." *Ngarurih* v. *Ashcroft*, 371 F.3d 182, 194 (4th Cir. 2004). Among the benefits are the ability to choose the date and manner of departing the country, avoidance of the stigma that may accompany forced removal, and exemption from the inadmissibility period that would otherwise accompany a departure from the United States after entry of an order of removal. 8 U.S.C. 1182(a)(9)(A); see pp. 2-3 & note 1, *supra*.[11] Among the burdens are the creation of

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[11] Petitioner suggests (Br. 29 n.20) that the exemption from the inadmissibility period contained in Section 1182(a)(9)(A) is often not a meaningful benefit because "a large number of aliens granted voluntary departure" will still be rendered inadmissible for ten years under a different provision of the INA, 8 U.S.C. 1182(a)(9)(B)(i)(II). That

an enforceable legal obligation "to depart the United States within the time period specified," 8 U.S.C. 1229c(d)(1) (Supp. V 2005), backed up by penalties if the alien fails to do so, 8 U.S.C. 1229c(b)(3) (forfeiture of voluntary departure bond); 8 U.S.C. 1229c(d)(1) (Supp. V 2005) (civil penalty of between $1000 and $5000 and ten-year period of ineligibility for certain forms of discretionary relief).

It is true that, as a practical matter, an alien's decision to seek voluntary departure at the conclusion of removal proceedings may limit—and in some cases foreclose—his ability to obtain reopening of those proceedings at a later date. But the same thing is true under petitioner's proposed approach, and it is unsurprising and unproblematic in any event.

The INA mandates no minimum period for a grant of voluntary departure, and it specifically instructs that one issued at the conclusion of removal proceedings "shall not be valid for a period exceeding 60 days." 8 U.S.C. 1229c(b)(2). At the same time, the INA provides that an alien "may file one motion to reopen proceedings," 8 U.S.C. 1229a(c)(7)(A) (Supp. V 2005), and that, outside specified circumstances not present here, such a motion "shall be filed within 90 days of * * *

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generally applicable restriction, however—which applies to any alien who was unlawfully present in the United States for one year or more—may be waived in situations where an alien can demonstrate that refusal of admission "would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien." 8 U.S.C. 1182(a)(9)(B)(v). In addition, even an alien who would not be eligible for such relief may reasonably conclude that the other benefits of voluntary departure—including the ability to put his affairs in order and depart on terms of his own choosing—may justify incurring the obligations that accompany such a grant. An alien who makes a different judgment remains free not to seek voluntary departure.

entry of a final administrative order of removal," 8 U.S.C. 1229a(c)(7)(C)(i) (Supp. V 2005). If "all aliens" truly have "the right to file a motion to reopen" (Pet. Br. 12) in the strong sense petitioner advocates, that right would presumably encompass the entire 90-day period that Congress allowed as a statutory maximum.[12] Yet petitioner makes no argument that a motion to reopen that is filed *after* the expiration of a voluntary departure period—which may not exceed 60 days and can be much shorter—yet still *before* the expiration of the current 90-day period for seeking reopening, protects the alien from the consequences of not departing within the time specified in the voluntary departure order. And the regulations specifically provide that it does not do so. 8 C.F.R. 1240.26(h). Thus, even under petitioner's proposal, there would be many situations in which an alien's decision to seek voluntary departure would limit his ability to obtain reopening at a later date.

Nor is that result surprising. First, nothing in the provisions allowing motions to reopen to be filed confers any new substantive rights on aliens, or dictates how such a motion will be acted upon, and whether to grant reopening remains entirely within the discretion of the Attorney General, even if the alien makes a prima facie case for relief. See p. 9, *supra*. Moreover, nothing in the provisions allowing the filing of motions for the discretionary relief of reopening remotely suggests that the normal operation of *other* provisions of the INA and

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[12] Although the Act imposes an outer limit of 90 days on the time within which a motion to reopen must be filed, it does not in terms prevent the Attorney General from allowing only a shorter period. Nor does the INA prevent the Attorney General from issuing regulations that foreclose relief in certain categories of cases, even if a motion is timely. See *Lopez* v. *Davis*, 531 U.S. 230 (2000).

implementing regulations, such as those governing voluntary departure, were to be affected in any way or that enforcement of the Board's order or other matters affecting the alien were to be brought to a standstill while the BIA considered a motion to reopen. The statutory provisions addressing motions to reopen simply provide that, subject to certain exceptions inapplicable here, "[a]n alien may file one motion to reopen" and that any such motion "shall be filed within 90 days of the date of entry of a final administrative order of removal." 8 U.S.C. 1229a(c)(7)(A) and (C)(i) (Supp. V 2005). Those provisions simply put in statutory form regulations that had been proposed in 1995 and adopted by the Attorney General five months before the enactment of IIRIRA in 1996 in order to place outer *limits* on the motion-to-reopen process. See note 6, *supra.*

Second, basic principles of statutory construction teach that "normally the specific governs the general," *Long Island Care at Home, Ltd.* v. *Coke*, 127 S. Ct. 2339, 2348 (2007), and that a party's choice to seek one form of relief may sometimes limit his ability to obtain another. The provisions allowing the filing of motions to reopen as a procedural matter apply to all aliens who are subject to a removal order. In contrast, the statutory limitation on the time during which the substantive relief of permission to depart voluntary remains valid is more "specific" because it applies only to that subcategory of removable aliens—which has ranged between 10% and 18% in recent years[13]—who seek and are granted that discretionary form of relief. Recognizing that the more specific limitation on voluntary departure

[13] Executive Office for Immigration Review, U.S. Dep't of Justice, *FY 2006 Statistical Year Book* Q1 (Feb. 2007) <http://www.usdoj.gov/eoir/statspub/fy06syb.pdf>.

must control in situations where it applies permits both sets of restrictions—those governing voluntary departure and those governing motions to reopen—to have effect. See *Dekoladenu* v. *Gonzales*, 459 F.3d 500, 505-506 (4th Cir. 2006), petition for cert. pending, No. 06-1285 (Mar. 22, 2007). A contrary conclusion would permit the voluntary departure restriction to be rendered inoperative in every case based on the unilateral actions of the very aliens whom Congress directed would be subject to severe consequences for failing to depart within the specified time.

Third, petitioner's automatic tolling argument is fundamentally inconsistent with the "disfavor[]" in which motions to reopen are held. *INS* v. *Doherty*, 502 U.S. 314, 323 (1992); accord *INS* v. *Abudu*, 485 U.S. 94, 107 (1988). As this Court has explained, "every delay [in removal proceedings] works to the advantage of the deportable alien who wishes merely to remain in the United States," *Doherty*, 502 U.S. 323, and "[o]ne illegally present in the United States * * * already has a substantial incentive to prolong litigation in order to delay physical deportation for as long as possible," *INS* v. *Rios-Pineda*, 471 U.S. 444, 450 (1985). These concerns are reflected in Congress's enactment of provisions in 1990 and 1996 to place strict limitations on the time within which motions to reopen may be filed. See p. 9 & note 6, *supra*. The text and purposes of the INA's voluntary departure provisions are entirely consistent with these limitations on motions to reopen: A key reason for conferring "substantial benefits" on aliens granted voluntary departure is to "provide[] an incentive to depart without dragging out the process and without requiring the agency and courts to devote resources to the matter." *Alimi*, 391 F.3d at 892. Peti-

tioner's proposed "tolling" rule therefore would not only be inconsistent with the Act's substantive limitations on permission to depart voluntarily, but also undermine the integrity of the removal process by giving *every* alien who is granted voluntary departure a powerful incentive to file a motion to reopen, whether or not he has any plausible claim for relief, in order to maximize the time he may remain in the United States. That result would also be particularly odd given the fact that the regulations expressly provide that the filing of a motion to reopen does *not*, outside narrowly specified circumstances, even stay the *forced removal* of an alien while that motion is being considered. See 8 C.F.R. 1003.2(f).[14]

The facts of this case well illustrate how petitioner's proposed rule would invite efforts to manipulate the voluntary departure process. Petitioner's United States citizen wife filed her second I-130 immediate relative visa petition two-and-a-half months *after* the initiation of removal proceedings against petitioner. After obtaining a nearly four-month continuance to enable his attorney to prepare for a removal hearing, petitioner sought another continuance. After the IJ denied that request, petitioner conceded removability and requested and was granted voluntary departure. Petitioner then appealed to the BIA, which affirmed the IJ's decision and allowed him 30 days to depart voluntary. Instead of departing, however, petitioner filed a motion to reopen his removal proceedings on the final work day before his voluntary

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[14] The regulations create exceptions for situations in which a removal order was entered *in absentia*. 8 C.F.R. 1003.2(f) (citing 8 C.F.R. 1003.23(b)(4)(ii) and (iii)(A)). Since January 5, 2006, the INA has provided that the filing of a motion to reopen by certain battered spouses and children also stays removal. 8 U.S.C. 1229a(c)(7)(C)(iv) (Supp. V 2005).

departure period was scheduled to expire, seeking precisely the same relief that the IJ and the BIA had already denied—further time for his wife's I-130 petition to be considered by DHS as a predicate for his later applying for adjustment of status—and purporting to "withdraw[]" his own previous request for voluntary departure. See pp. 10-12, *supra*. The latter feature of his motion indicates that petitioner was aware of the consequences of non-compliance with the voluntary departure order that he himself had sought and obtained based on a representation that he intended to depart the country if it were granted.

Fourth, the conclusion that the mere filing of a motion to reopen neither stays entry of the alternate order of removal nor excuses an alien from the consequences of failing to depart within the time specified in a voluntary departure order is consistent with the law's treatment of analogous orders. As this Court explained in *Stone*, because of the particular nature of the INA's judicial review provisions, which contemplate separate petitions for review of a final removal order and the denial of a motion to reopen, see 8 U.S.C. 1252(b)(6), "[t]he closest analogy" to a motion for discretionary reopening or reconsideration of the final decision in a completed removal proceeding "is the motion for relief from judgment under Federal Rule of Civil Procedure 60(b)." *Stone*, 514 U.S. at 401. But it is black letter law that the filing of a Rule 60(b) motion more than 10 days after judgment "does not affect the finality of a judgment *or suspend its operation*"; rather, a suspension or stay requires an affirmative order by the court entered "[i]n its discretion and on such conditions * * * as are proper." Fed. R. Civ. P. 60(b), 62(b) (emphasis added); see *Stone*, 514 U.S. at 401-403. In addition, although most courts

of appeals to have considered the question have concluded that they have the authority to stay the running of a voluntary departure period[15]—a conclusion that is itself difficult to square with the statutory limitation on that substantive relief and the foreclosure of judicial review of issues concerning voluntary departure—*none* has held that the mere filing of a petition for judicial review *automatically* triggers such a stay. Indeed, the filing of a petition for review does not automatically stay even the physical removal of the alien. 8 U.S.C. 1252(b)(3)(B) ("Service of the petition [for review] on the officer or employee does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise."). That latter provision, too, represents a marked departure from pre-IIRIRA law—a departure intended to expedite the removal of aliens. Under pre-IIRIRA law, the service of a petition for review *did* automatically stay the alien's removal unless the reviewing court directed that it *did not* (or the alien was an aggravated felon). *Stone*, 514 U.S. 398 (citing 8 U.S.C. 1105a(a)(3) (1994)).[16]

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[15] *Bocova* v. *Gonzales*, 412 F.3d 257, 266 (1st Cir. 2005); *Thapa* v. *Gonzales*, 460 F.3d 323, 325 (2d Cir. 2006); *Obale* v. *Attorney Gen.*, 453 F.3d 151, 157 (3d Cir. 2006); *Vidal* v. *Gonzales*, 491 F.3d 250, 252 (5th Cir. 2007); *Nwakanma* v. *Ashcroft*, 352 F.3d 325, 327 (6th Cir. 2003); *Lopez-Chavez* v. *Ashcroft*, 383 F.3d 650, 654 (7th Cir. 2004); *Rife* v. *Ashcroft*, 374 F.3d 606, 615-616 (8th Cir. 2004); *El Himri* v. *Ashcroft*, 344 F.3d 1261, 1262 (9th Cir. 2003). But see *Ngarurih*, 371 F.3d at 194 (courts of appeals lack authority to stay expiration of a voluntary departure period).

[16] Nor does it matter that, post-IIRIRA, a court may continue to exercise jurisdiction over a petition for review notwithstanding an alien's departure from the country, IIRIRA § 306(b), 110 Stat. 3009-612 (repealing 8 U.S.C. 1105a(c) (1994)), whereas the Attorney General has provided by regulation that an alien's departure "shall constitute a

Petitioner is correct (Br. 34-38) that the seeking of further relief from an initial tribunal often suspends the period for seeking review by a higher one. But the precept that a timely filed motion to reopen or reconsider renders the underlying judgment "nonfinal *for purposes of appeal*," is based on an assessment of the most effective way to allocate resources between different tribunals. *United States* v. *Dieter*, 429 U.S. 6, 8 (1976) (per curiam) (emphasis added); see *ibid.* (stating that a contrary rule would "prolong[] litigation and unnecessarily burden[]" reviewing tribunals, "since plenary consideration of an issue by an appellate court ordinarily requires more time than is required for disposition by a trial court of a petition for rehearing"). What is more relevant here is that it is well-settled that the filing of motion for relief from judgment with the district court does not automatically suspend the force or execution of the judgment in the absence of an order of that court.[17]

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withdrawal" of any previously filed motion to reopen and preclude the filing of a new one. 8 C.F.R. 1003.2(d) (BIA), 1003.23(b)(1) (IJ). Although that regulation has "been the subject of litigation" (Pet. Br. 21 n.11), petitioner did not challenge it below and does not challenge it before this Court, and the regulation's validity is not fairly encompassed within the question presented. And, as already explained, an alien who wishes to leave open the option to obtain full consideration of a motion to reopen need only decline to seek voluntary departure in the first place.

[17] Petitioner's extensive reliance on *Costello* v. *INS*, 376 U.S. 120 (1964) (Br. 14-21), is misplaced. *Costello* did not involve time periods or tolling, and the petitioner in that case was not asserting an entitlement based on a unilateral act of his own. In addition, although petitioner attempts to gloss over the fact (Br. 15), the Court began its opinion in *Costello* with a several-page explanation of why the text of the relevant provision (former 8 U.S.C. 1251(a)(4) (1964)), as well as its legislative history, was ambiguous about whether it permitted deportation "only of one who was an alien at the time of his convictions." *Costello*, 376

More fundamentally, however, petitioner's argument based on *Dieter* and similar decisions cannot be squared with this Court's decision in *Stone*. There, the Court held that an order of the BIA is final when entered and that the period for filing a petition for review runs from that date, notwithstanding the filing of a motion to reconsider (or, here, to reopen). The Court recognized the general rule in the administrative law context that the filing of a motion to reopen or reconsider with the agency renders the decision non-final for purposes of judicial review, but it held that that rule is inapplicable to final deportation orders under the INA. 514 U.S. at 392-393, 405. See generally *id.* at 393-401.[18]

U.S. at 122; see *id.* at 122-126. Having identified that statutory ambiguity, the Court resolved it in large measure based on the conclusion that one of two otherwise equally plausible interpretations would have rendered another provision, former 8 U.S.C. 1252(b) (1964), "a dead letter" as applied to certain aliens. *Costello*, 376 U.S. at 127. Here, in contrast, the question is not whether petitioner is removable, but the intersection of *discretionary* forms of relief. Moreover, the text of the voluntary departure provision imposes clear limits on who may grant voluntary departure and how long the period may last (Part A, *supra*); the statutory history demonstrates that Congress did not intend for courts to make additional exceptions to those restrictions (Part B, *supra*); and adoption of petitioner's proposed tolling rule would make the congressionally mandated limits on voluntary departure a dead letter with respect to any alien who files a motion to reopen (Part C, *supra*).

[18] Petitioner's attempted comparison between administrative appeals to the BIA and the filing of a motion to reopen (Br. 18-19, 37-40) misses the mark. Although the Board has recently reaffirmed its pre-IIRIRA holding in *In re Chouliaris*, 16 I. & N. Dec. 168 (B.I.A. 1977), that "the timely filing of an appeal * * * tolls the running of the time authorized by the Immigration Judge for voluntary departure," *In re A-M-*, 23 I. & N. Dec. 737, 743 (B.I.A. 2005), the statutory and regulatory provisions relied upon in *In re A-M-* make clear that it is more accurate

There is another respect as well in which *Stone* strongly reinforces the conclusion that the filing of a motion to reopen does not automatically toll the running of the voluntary departure period, or permit an alien to disregard his undertaking to depart within the time allowed. In reaching the conclusion that a final order of deportation remains final notwithstanding the filing of a motion to reopen, and that the time for filing a petition for judicial review of that order therefore is not tolled by the filing of a motion for reconsideration, the Court pointed out that it was the longstanding position of the Attorney General, "a view we presume Congress understood when it amended the Act in 1990," that the filing of a motion for reconsideration (or reopening) does not serve to stay the deportation order. *Stone*, 514 U.S. at 398 (citing 8 C.F.R. 3.8 (1977)). Similarly, here it must be presumed that Congress again understood that same rule when it enacted IIRIRA, which included both a

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to say that the filing of a timely appeal prevents the IJ's order—including the grant of voluntary departure—from becoming final in the first place. *Ibid.* (citing 8 U.S.C. 1101(a)(47)(B)(i), which states that, in cases where an administrative appeal is filed, an IJ order "become[s] final upon * * * a determination by the [BIA] affirming such order," and 8 C.F.R. 1241.1(f), which provides that if an alien files a timely appeal, "the [IJ's] order shall become final upon an order of removal by the Board * * *, or upon overstay of any voluntary departure period granted or reinstated by the Board"). In contrast, a motion to reopen removal proceedings is, by definition, filed *after* the underlying order has become final. Equally important, the statutory and regulatory provisions depriving an IJ decision that has been appealed of finality are the kind of provisions one would expect to see if petitioner's view of the effect of filing a motion to reopen were correct. Petitioner effectively asserts that the filing of a motion to reopen renders the Board's decision non-final. But, as this Court squarely held in *Stone*, that is not the consequence of a motion to reopen under the INA.

reenactment of the judicial review provisions at issue in *Stone*, see 8 U.S.C. 1252, and the enactment of statutory provisions addressing voluntary departure and reopening at issue in this case. That presumption of Congress's understanding is all the more compelling given this Court's intervening decision in *Stone* highlighting the Attorney General's longstanding position. The current regulations continue to embody the rule that a motion to reopen does not stay execution of the removal order, see 8 C.F.R. 1003.2(f), and petitioner does not question its validity. Because a provision in the BIA's final order that allows voluntary departure is simply an alternative to the formal removal order set forth in the same BIA decision, it follows from that regulation that the voluntary departure requirement of the BIA's decision is likewise not stayed or tolled by the filing of a motion to reopen.

D. The Agency's Longstanding Position That The Filing Of A Motion To Reopen Does Not Suspend The Time For Voluntary Departure Warrants Deference

1. The Attorney General and his designate the BIA have long taken the position that the filing of a motion to reopen removal proceedings does not automatically suspend the running of a voluntary departure period previously granted by an IJ or the Board. Although resort to principles of deference is not necessary to sustain the Attorney General's position here, that longstanding position provides strong additional support for rejecting petitioner's tolling proposal, especially in light of the express statutory conferral of authority on the Attorney General to interpret the Act and issue regulations to carry out his authority, see 8 U.S.C. 1103(a)(1) and (3); the vesting in him of discretion with respect to

the granting of *both* voluntary departure and reopening; and the Attorney General's and the BIA's extensive experience in administering the INA.

Subject to certain statutory limits on eligibility, Congress has provided that "[t]he Attorney General *may* permit" certain removable aliens "voluntarily to depart the United States at the alien's own expense." 8 U.S.C. 1229c(a)(1) and (b)(1) (emphasis added). The INA further provides that "[t]he Attorney General may by regulation limit eligibility for voluntary departure * * * for any class or classes of aliens," and that "[n]o court may review any regulation issued under this subsection." 8 U.S.C. 1229c(e). The Attorney General, in turn, has by regulation authorized the BIA, "through precedent decisions, [to] provide clear and uniform guidance to the Service, the immigration judges, and the general public on the proper interpretation and administration of the Act and its implementing regulations." 8 C.F.R. 1003.1(d)(1). This Court has held "that principles of *Chevron* deference are applicable to this statutory scheme," and "that the BIA should be accorded *Chevron* deference as it gives ambiguous statutory terms 'concrete meaning through a process of case-by-case adjudication.'" *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-425 (1999) (quoting *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 448 (1987)).

As noted above and by this Court in *Stone*, "it has been the longstanding view of the INS * * * that a motion for reconsideration does not serve to stay [a] deportation order." 514 U.S. at 398 (citing 8 C.F.R. 3.8 (1977)). As a corollary to that rule, it likewise has been the Board's longstanding view—both pre- and post-IIRIRA—that the filing of a motion to reopen removal proceedings neither extends the time during which an

alien's permission to depart voluntarily in lieu of removal remains valid, nor immunizes such an alien from the consequences of failing to depart within the time specified.

In 1996, shortly before IIRIRA's enactment, the BIA issued an en banc precedential opinion concluding that "the expiration of the period of voluntary departure while a motion to reopen is pending renders" an alien subject to the penalties that attach upon overstay of a voluntary departure period. *Shaar*, 21 I. & N. Dec. at 542, 549. Under the voluntary departure provisions as they existed at the time of *Shaar*, those penalties were applicable to any alien "who remain[ed] in the United States after the scheduled date of departure, other than because of exceptional circumstances." 8 U.S.C. 1252b(e)(2)(A) (1994). The term "exceptional circumstances," in turn, was defined as meaning "exceptional circumstances (such as serious illness of the alien or death of an immediate relative of the alien, but not including less compelling circumstances) beyond the control of the alien." 8 U.S.C. 1252b(f)(2) (1994).

Shaar's holding had two parts. First, the Board determined that neither "the mere filing of a motion to reopen" nor an IJ's "failure to adjudicate [such a] motion prior to the expiration of [a] voluntary departure period" constituted "an 'exceptional circumstance'" that would excuse an alien's failure to depart under the pre-IIRIRA provision of the INA discussed above (at pp. 24), which has since been repealed. 21 I. & N. Dec. at 544. Although the BIA stated that "[i]t may well be true that many aliens accept voluntary departure with the hope of actually remaining here and qualifying for permanent relief from deportation," it viewed Congress's 1990 enactment of a five-year ineligibility period for

aliens who fail to depart within the time specified as reflecting "an unstated but clear disapproval of that practice" and an "expect[ation] that an alien who is given voluntary departure will actually leave the United States in accordance with that grant of relief." *Id.* at 546.

Second, *Shaar* considered and squarely rejected the argument "that the filing of a nonfrivolous motion to reopen prior to the expiration of a period of voluntary departure tolls expiration of the period of voluntary departure." 21 I. & N. Dec. at 546. The Board described that view as "find[ing] no support in the federal regulations or prior case law and fail[ing] to acknowledge the disfavor with which motions to reopen have long been viewed." *Id.* at 547. The BIA specifically distinguished administrative appeals of an IJ's decision from motions to reopen, noting that whereas federal regulations "mandate an automatic stay of execution of an Immigration Judge's initial decision while an appeal is pending with the Board, an automatic stay is not available to an alien filing a motion to reopen." *Id.* at 548 (citing 8 C.F.R. 3.6(b), 3.8(a) (1995)). As a result, the Board determined that the regulations "contemplate that an alien who has been granted voluntary departure may have to depart the United States while a motion is pending." *Ibid.* In addition, the Board emphasized that such aliens are "not completely without remedy," because an alien whose voluntary departure period is about to expire "may seek an extension of this period from the district director." *Ibid.* (citing 8 C.F.R. 244.2 (1995)).

The Board has not issued another precedential decision on the same question since IIRIRA's enactment. It has, however, continued to apply the rule announced in *Shaar*, as demonstrated by its decision in this case and

other similar decisions that have reached the courts of appeals.

The BIA's consistent practice accords with the interim rule that the Attorney General promulgated to implement IIRIRA on March 6, 1997. 62 Fed. Reg. 10,312. Those regulations do not state that the conclusion reached by the Board in *Shaar* was incorrect or to be superseded. To the contrary, they continue to provide that the filing of a motion to reopen or reconsider "shall not stay the execution of any decision made in the case" and that "[e]xecution of such decision shall proceed unless a stay of execution is specifically granted by" the Board or the IJ. 8 C.F.R. 1003.2(f). The regulations also expressly permit the reinstatement of voluntary departure in the context of motions to reopen, but *only* in situations where the motion was not only *filed* but also *granted* before the expiration of the period allowed for voluntary departure. 8 C.F.R. 240.26 (1997) ("An immigration judge or the Board may reinstate voluntary departure in a removal proceeding that has been reopened * * * if reopening was granted prior to the expiration of the original period of voluntary departure.") (now codified at 8 C.F.R. 1240.26(h)). The clear import of this provision is that the mere *filing* of a motion to reopen does not suspend the running of a voluntary departure period.

Petitioner cites (Br. 18) a passage in the preamble to the interim rule stating that "several commenters [had] requested clarification regarding the effect" of various filings—"a motion or appeal to the Immigration Court, BIA, or a federal court"—"on any period of voluntary departure already granted." 62 Fed. Reg. at 10,325. Although "the Department considered several options," including "no tolling of any period of voluntary depar-

ture; tolling the voluntary departure period for any period that an appeal or motion is pending; or setting a brief, fixed period of voluntary departure * * * after any appeal or motion is resolved," the interim rule stated that the Department "ha[d] not adopted any position or modified the interim rule," and it "solicit[ed] additional public comments on these or other possible approaches." *Id.* at 10,326.

Because that statement in the 1997 rulemaking merely sought public comments about the possible application of tolling in three different contexts, it scarcely reflects a determination by the Department that a rule of *automatic* tolling would be appropriate in the specific context of reopening, much less that the Act *compels* it. Tellingly, moreover, the Department's pre- and post-IIRIRA practice has remained consistent with respect to all three types of filings referred to in the preamble passage quoted above: administrative appeals of an IJ decision to the BIA, petitions for judicial review, and motions to reopen or reconsider. The BIA's view was and continues to be that the filing of a timely appeal to the BIA prevents the IJ's decision from becoming final, 8 C.F.R. 1241.1(f); *In re A-M-*, 23 I. & N. Dec. 737, 743 (B.I.A. 2005), and for that reason the period of voluntary departure does not begin to run until after the BIA enters its final decision. In contrast, the government's position was and continues to be that the filing of a petition for review with a court of appeals does not by itself suspend the running of a voluntary departure period, a position which no court of appeals has disagreed. See pp. 35-36, *supra*. And the Board's view was (*Shaar*, 21 I. & N. Dec. at 542, 549) and continues to be (Pet. App. 3-4; pp. 43-44, *supra*) that an alien's unilateral act of filing a motion to reopen removal proceedings neither

extends the time for voluntary departure nor excuses the alien's failure to depart within the time specified. Post-IIRIRA, as before, that remains at the very least a reasonable interpretation of the Act and its implementing regulations.

Nor can it reasonably be maintained that "the rationales that underlay *Shaar* are no longer applicable after IIRIRA." *Azarte* v. *Ashcroft*, 394 F.3d 1278, 1286 (9th Cir. 2005). Although it is true that an alien's ability to file a motion to reopen made its first appearance in the United States Code in 1996 when Congress provided that "[a]n alien may file *one* motion to reopen," 8 U.S.C. 1229a(c)(6)(A) (now 8 U.S.C. 1229a(c)(7)(A) (Supp. V 2005)) (emphasis added), the regulations in effect at the time of *Shaar* expressly authorized motions to reopen as well, see 21 I. & N. Dec. at 547 (citing 8 C.F.R. 3.2 (1995)). And it requires an enormous, and completely unwarranted, logical leap to conclude that because "neither the pre-IIRIRA statute on voluntary departure nor the pre-IIRIRA regulation on motions to reopen had any time limits,"[19] and "the voluntary departure periods that were initially granted were much more generous pre-IIRIRA," *Azarte*, 394 F.3d at 1286-1287, see Pet. Br. 20 n.10, the enactment of IIRIRA now *compels* the very tolling rule that the en banc BIA rejected in *Shaar*. Neither petitioner nor the courts of appeals that have endorsed the position he urges have pointed to anything in the text of the Act or its legislative history that remotely suggests such a dramatic reversal. To the contrary, a rule of automatic extension of the voluntary departure period upon an alien's unilateral act of filing a motion to reopen would flatly contradict the statutory

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[19] But see p. 9 & note 6, *supra*.

directive that "[p]ermission to depart voluntarily shall not be valid for a period exceeding 60 days." 8 U.S.C. 1229c(b)(2).

2. As the government noted in its brief in opposition (at 14), the Department of Justice has determined that it will promulgate regulations to address directly the effect of an alien's filing of a motion to reopen on a previous grant of voluntary departure. On November 30, 2007, the Attorney General issued a proposed rule addressing a number of issues related to voluntary departure. 72 Fed. Reg. at 67,674. The proposed rule would, *inter alia*, expressly provide that an alien's filing of a motion to reopen or reconsider with the Board "prior to the expiration of the voluntary departure period will have the effect of automatically terminating the grant of voluntary departure." *Ibid.* As a result, an alien who previously had agreed to depart voluntarily within the time specified in the BIA's order, and thereby to forgo any further dispute over his continued presence in this country, would be given the opportunity to withdraw from that agreement, file a motion to reopen in an effort to obtain the ability to remain, and avoid the penalties for overstaying his voluntary departure period if he chose to remain in the country until the BIA or the court ruled. Of course, the alien would then be subject to removal under the alternate order of removal in the BIA's order (and the attendant consequences of removal) unless he obtained a stay of removal pending further review from the BIA or the court. Similarly, the filing of a petition for review with a court of appeals would also have the effect of terminating the permission to depart voluntarily. *Ibid.*

The proposed rule would "app[ly] prospectively only, that is, only with respect to immigration judge orders

issued on or after the effective date of the final rule that grant a period of voluntary departure." 72 Fed. Reg. at 67,682. But the proposed rule's introductory text also contains a detailed explanation of why the Attorney General's "interpretation of the [INA] and *the existing regulations* is that the filing of a motion to reconsider or reopen * * * does not automatically toll the voluntary departure period." *Id.* at 67,678 (emphasis added); see *id.* at 67,676-67,678. As the proposed rule explains, "current judicial precedents in some circuits * * * bea[r] little resemblance to the statutory mandate that the alien who requests and is granted voluntary departure at the conclusion of removal proceedings is expected to depart voluntarily no more than 60 days after the administrative order becomes final," *id.* at 67,677, and "[t]his result is * * * contrary to the clear congressional intent to limit the period of time allowed under the voluntary departure provisions, which before the 1996 amendments had allowed aliens to remain in the United States for many months or even years under grants of voluntary departure," *id.* at 67,678. Thus, even if the Court were to conclude that there previously was "no clear agency guidance," "it would be absurd to ignore the agency's current authoritative pronouncement of what the statute means," particularly in light of the fact that the views set forth in the preamble to the proposed rule explain the course that the BIA has been following for years rather than "replac[ing] a prior agency interpretation." *Smiley* v. *Citibank (S.D.) N.A.*, 517 U.S. 735, 744 n.3 (1996).

E. The Constitutional Avoidance Canon Provides No Warrant For A Different Conclusion

Although petitioner raises no direct constitutional claim, he asserts that the conclusion that the mere filing of a motion to reopen removal proceedings does not extend the time within which a discretionary grant of voluntary departure remains valid would raise "serious constitutional doubts." Pet. Br. 38 (quoting *Clark* v. *Martinez*, 543 U.S. 371, 380-382 (2005)). That assertion is without merit.

The constitutional avoidance canon is "a means of giving effect to congressional intent, not of subverting it." *Clark*, 543 U.S. at 382. It "is not a license for the judiciary to rewrite language enacted by the legislature," *Salinas* v. *United States*, 522 U.S. 52, 59-60 (1997) (quoting *United States* v. *Albertini*, 472 U.S. 675, 680 (1985)), and it "does not give a court the prerogative to ignore the legislative will," *CFTC* v. *Schor*, 478 U.S. 833, 841 (1986). As explained previously, the text (Part A, *supra*) and statutory history (Part B, *supra*) of the voluntary departure statute clearly refute the proposition that Congress intended for the restrictions on granting, and the consequences for failing to comply with the terms of, that form of discretionary relief to be subject to evasion based on an alien's unilateral act of filing a motion to reopen removal proceedings. That conclusion is fully consistent with the statutory and regulatory provisions governing motions to reopen (Part C, *supra*), and it also represents the considered and consistent view of the Executive Branch officials charged with implementing the INA in general and voluntary departure in particular (Part D, *supra*).

Petitioner's arguments about the constitutionality of the Act and regulations as construed and applied by the Attorney General are unfounded in any event. Petitioner does not assert that he had a liberty or property interest in the granting of his motion to reopen. Nor could he. The granting of such a motion "is entirely within the BIA's discretion," *INS* v. *Phinpathya*, 464 U.S. 183, 188 n.6 (1984), see p. 9, *supra*, and the ultimate relief petitioner sought to obtain by filing a motion to reopen was adjustment of status, relief that is itself discretionary with the Attorney General. 8 U.S.C. 1255(a). A person's "unilateral hope" of securing a discretionary benefit cannot create a constitutionally cognizable interest in obtaining it. *Connecticut Bd. of Pardons* v. *Dumschat*, 452 U.S. 458, 465 (1981).

Petitioner also contends (Br. 42-46) that he had a constitutionally protected "property" interest in having the BIA resolve his motion to reopen. But the Board *did* resolve petitioner's motion: It denied the motion on the ground that petitioner's overstay of his voluntary departure period had rendered him statutorily ineligible for the form of relief that he had indicated that he would be seeking if the motion to reopen were granted. Pet. App. 4. Accordingly, for any due process claim to have substance, petitioner would need to establish that he had a constitutionally cognizable interest in either (1) having the BIA resolve a motion that was filed on a Friday before the expiration of his voluntary departure period two days later, or (2) obtaining a unilateral extension of the voluntary departure period that he himself requested from the IJ. Simply to state either proposition is to refute it.

Nor does the BIA's decision in this case give rise to any equal protection questions. Petitioner does not

claim to be a member of a suspect class, so any conceivable classification must survive only rational basis review. The date on which petitioner filed his motion to reopen was entirely of his own choosing, and petitioner cites no example of a situation where an alien who previously sought and was granted voluntary departure was able to obtain adjudication of a motion to reopen within a two-day period. Pet. Br. 22-23 & nn.13-14 (listing periods ranging from 23 days to more than 6 months). And, as explained previously, the pertinent distinction between certain "criminal aliens" and "favored aliens" like petitioner (*id.* at 29) is that only the latter are permitted, but not required, to seek the benefits and accept the burdens that accompany a grant of voluntary departure. Petitioner has not alleged that he was inadequately warned of the consequences of overstaying his voluntary departure period, and requiring him to bear the consequences of his choice to seek voluntary departure and his failure to comply with its terms raises no constitutional concerns.[20]

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[20] Nor is there any merit to petitioner's assertion (Br. 49) that "the Court should toll the voluntary departure period in this case," even if it does not hold that the INA requires tolling as a general matter. For the reasons already explained, the INA simply does not provide that an alien's filing of a motion to reopen automatically extends the period in which a grant of voluntary departure remains valid, and that has been the Attorney General's position for many years.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 8 U.S.C. 1101 provides in pertinent part:

Definitions

* * * * *

(47)(A) The term "order of deportation" means the order of the special inquiry officer, or other such administrative officer to whom the Attorney General has delegated the responsibility for determining whether an alien is deportable, concluding that the alien is deportable or ordering deportation.

(B) The order described under subparagraph (A) shall become final upon the earlier of—

(i) a determination by the Board of Immigration Appeals affirming such order; or

(ii) the expiration of the period in which the alien is permitted to seek review of such order by the Board of Immigration Appeals.

* * * * *

2. 8 U.S.C. 1182 provides in pertinent part:

Inadmissible aliens

(a) Classes of aliens ineligible for visas or admission

Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

* * * * *

(9) Aliens previously removed

(A) Certain aliens previously removed

(i) Arriving aliens

Any alien who has been ordered removed under section 1225(b)(1) of this title or at the end of proceedings under section 1229a of this title initiated upon the alien's arrival in the United States and who again seeks admission within 5 years of the date of such removal (or within 20 years in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(ii) Other aliens

Any alien not described in clause (i) who—

(I) has been ordered removed under section 1229a of this title or any other provision of law, or

(II) departed the United States while an order of removal was outstanding,

and who seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(iii) Exception

Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted

from foreign contiguous territory, the Attorney General has consented to the alien's reapplying for admission.

B) Aliens unlawfully present

(i) In general

Any alien (other than an alien lawfully admitted for permanent residence) who—

(I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States (whether or not pursuant to section 1254a(e) of this title) prior to the commencement of proceedings under section 1225(b)(1) or section 1229(a) of this title, and again seeks admission within 3 years of the date of such alien's departure or removal, or

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

* * * * *

(iv) Tolling for good cause

In the case of an alien who—

(I) has been lawfully admitted or paroled into the United States,

(II) has filed a nonfrivolous application for a change or extension of status before the date of

expiration of the period of stay authorized by the Attorney General, and

(III) has not been employed without authorization in the United States before or during the pendency of such application.

the calculation of the period of time specified in clause (i)(I) shall be tolled during the pendency of such application, but not to exceed 120 days.

(v) Waiver

The Attorney General has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien. No court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause.

* * * * *

3. 8 U.S.C. 1229a (2000 & Supp. V 2005) provides in part:

Removal proceedings

* * * * *

(c) Decision and burden of proof

* * * * *

(7) Motions to reopen

(A) In general

An alien may file one motion to reopen proceedings under this section, except that this limitation shall not apply so as to prevent the filing of one motion to reopen described in subparagraph (C)(iv).

(B) Contents

The motion to reopen shall state the new facts that will be proven at a hearing to be held if the motion is granted, and shall be supported by affidavits or other evidentiary material.

(C) Deadline

(i) In general

Except as provided in this subparagraph, the motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal.

(ii) Asylum

There is no time limit on the filing of a motion to reopen if the basis of the motion is to apply for

relief under sections[1] 1158 or 1231(b)(3) of this title and is based on changed country conditions arising in the country of nationality or the country to which removal has been ordered, if such evidence is material and was not available and would not have been discovered or presented at the previous proceeding.

(iii) Failure to appear

The filing of a motion to reopen an order entered pursuant to subsection (b)(5) of this section is subject to the deadline specified in subparagraph (C) of such subsection.

(iv) Special rule for battered spouses, children, and parents

Any limitations under this section on the deadlines for filing such motions shall not apply—

(I) If the basis for the motion is to apply for relief under clause (iii) or (iv) of section 1154(a)(1)(A) of this title, clause (ii) or (iii) of section 1154(a)(1)(B) of this title,,[1] section 1229b(b) of this title, or section 1254(a)(3) of this title (as in effect on March 31, 1997);

(II) if the motion is accompanied by a cancellation of removal application to be filed with the Attorney General or by a copy of the self-petition that has been or will be filed with the Immigration and Naturalization Service upon the granting of the motion to reopen;

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[1] So in original

[1] So in original. A closing parenthesis probably should appear.

(III) if the motion to reopen is filed within 1 year of the entry of the final order of removal, except that the Attorney General may, in the Attorney General's discretion, waive this time limitation in the case of the alien who demonstrates extraordinary circumstances or extreme hardship to the alien's child; and

(IV) if the alien is physically present in the United States at the time of filing the motion.

The filing of a motion to reopen under this clause shall only stay the removal of a qualified alien (as defined in section 1641(c)(1)(B) of this title[2] pending the final disposition of the motion, including exhaustion of all appeals if the motion establishes that the alien is a qualified alien.

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[2] So in original. A closing parenthesis probably should appear.

4. 8 U.S.C. 1229c (2000 & Supp. V 2005) provides:

Voluntary departure

(a) Certain conditions

(1) In general

The Attorney General may permit an alien voluntarily to depart the United States at the alien's own expense under this subsection, in lieu of being subject to proceedings under section 1229a of this title or prior to the completion of such proceedings, if the alien is not deportable under section 1227(a)(2)(A)(iii) or section 1227(a)(4)(B) of this title.

(2) Period

(A) In general

Subject to subparagraph (B), permission to depart voluntarily under this subsection shall not be valid for a period exceeding 120 days.

(B) Three-year pilot program waiver

During the period October 1, 2000, through September 30, 2003, and subject to subparagraphs (C) and (D)(ii), the Attorney General may, in the discretion of the Attorney General for humanitarian purposes, waive application of subparagraph (A) in the case of an alien—

(i) who was admitted to the United States as a nonimmigrant visitor (described in section 1101(a)(15)(B) of this title) under the provisions of the visa waiver pilot program established pursuant to section 1187 of this title, seeks the waiver for the purpose of continuing to receive

medical treatment in the United States from a physician associated with a health care facility, and submits to the Attorney General—

(I) a detailed diagnosis statement from the physician, which includes the treatment being sought and the expected time period the alien will be required to remain in the United States;

(II) a statement from the health care facility containing an assurance that the alien's treatment is not being paid through any Federal or State public health assistance, that the alien's account has no outstanding balance, and that such facility will notify the Service when the alien is released or treatment is terminated; and

(III) evidence of financial ability to support the alien's day-to-day expenses while in the United States (including the expenses of any family member described in clause (ii)) and evidence that any such alien or family member is not receiving any form of public assistance; or

(ii) who—

(I) is a spouse, parent, brother, sister, son, daughter, or other family member of a principal alien described in clause (i); and

(II) entered the United States accompanying, and with the same status as, such principal alien.

(C) Waiver limitations

(i) Waivers under subparagraph (B) may be granted only upon a request submitted by a Service district office to Service headquarters.

(ii) Not more than 300 waivers may be granted for any fiscal year for a principal alien under subparagraph (B)(i).

(iii)(I) Except as provided in subclause (II), in the case of each principal alien described in subparagraph (B)(i) not more than one adult may be granted a waiver under subparagraph (B)(ii).

(II) Not more than two adults may be granted a waiver under subparagraph (b)(ii) in a case in which—

(aa) the principal alien described in subparagraph (B)(i) is a dependent under the age of 18; or

(bb) one such adult is age 55 or older or is physically handicapped.

(D) Report to Congress; suspension of waiver authority

(i) Not later than March 30 of each year, the Commissioner shall submit to the Congress an annual report regarding all waivers granted under subparagraph (B) during the preceding fiscal year.

(ii) Notwithstanding any other provision of law, the authority of the Attorney General under subparagraph (B) shall be suspended during any period

in which an annual report under clause (i) is past due and has not been submitted.

(3) Bond

The Attorney General may require an alien permitted to depart voluntarily under this subsection to post a voluntary departure bond, to be surrendered upon proof that the alien has departed the United States within the time specified.

(4) Treatment of aliens arriving in the United States

In the case of an alien who is arriving in the United States and with respect to whom proceedings under section 1229a of this title are (or would otherwise be) initiated at the time of such alien's arrival, paragraph (1) shall not apply. Nothing in this paragraph shall be construed as preventing such an alien from withdrawing the application for admission in accordance with section 1225(a)(4) of this title.

b) At conclusion of proceedings

(1) In general

The Attorney General may permit an alien voluntarily to depart the United States at the alien's own expense if, at the conclusion of a proceeding under section 1229a of this title, the immigration judge enters an order granting voluntary departure in lieu of removal and finds that—

(A) the alien has been physically present in the United States for a period of at least one year immediately preceding the date the notice to appear was served under section 1229(a) of this title;

(B) the alien is, and has been, a person of good moral character for at least 5 years immediately preceding the alien's application for voluntary departure;

(C) the alien is not deportable under section 1227(a)(2)(A)(iii) or section 1227(a)(4) of this title; and

(D) the alien has established by clear and convincing evidence that the alien has the means to depart the United States and intends to do so.

(2) Period

Permission to depart voluntarily under this subsection shall not be valid for a period exceeding 60 days.

(3) Bond

An alien permitted to depart voluntarily under this subsection shall be required to post a voluntary departure bond, in an amount necessary to ensure that the alien will depart, to be surrendered upon proof that the alien has departed the United States within the time specified.

(c) Aliens not eligible

The Attorney General shall not permit an alien to depart voluntarily under this section if the alien was previously permitted to so depart after having been found inadmissible under section 1182(a)(6)(A) of this title.

(d) Civil penalty for failure to depart

(1) In general

Subject to paragraph (2), if an alien is permitted to depart voluntarily under this section and voluntarily

fails to depart the United States within the time period specified, the alien—

(A) shall be subject to a civil penalty of not less than $1,000 and not more than $5,000; and

(B) shall be ineligible, for a period of 10 years, to receive any further relief under this section and sections 1229b, 1255, 1258, and 1259 of this title.

(2) Application of VAWA protections

The restrictions on relief under paragraph (1) shall not apply to relief under section 1229b or 1255 of this title on the basis of a petition filed by a VAWA self-petitioner, or a petition filed under section 1229b(b)(2) of this title, or under section 1254(a)(3) of this title (as in effect prior to March 31, 1997), if the extreme cruelty or battery was at least one central reason for the alien's overstaying the grant of voluntary departure.

(3) Notice of penalties

The order permitting an alien to depart voluntarily shall inform the alien of the penalties under this subsection.

(e) Additional conditions

The Attorney General may by regulation limit eligibility for voluntary departure under this section for any class or classes of aliens. No court may review any regulation issued under this subsection.

(f) Judicial review

No court shall have jurisdiction over an appeal from denial of a request for an order of voluntary departure

under subsection (b) of this section, nor shall any court order a stay of an alien's removal pending consideration of any claim with respect to voluntary departure.

5. 8 U.S.C. 1229c (2000) provided in pertinent part:

Voluntary departure

* * * * *

(d) Civil penalty for failure to depart

If an alien is permitted to depart voluntarily under this section and fails voluntarily to depart the United States within the time period specified, the alien shall be subject to a civil penalty of not less than $1,000 and not more than $5,000, and be ineligible for a period of 10 years for any further relief under this section and sections 1229b, 1255, 1258, and 1259 of this title. The order permitting the alien to depart voluntarily shall inform the alien of the penalties under this subsection.

6. 8 U.S.C. 1252b (Supp. I 1991) provided in pertinent part:

Deportation procedures

* * * * *

(e) Limitation on discretionary relief for failure to appear

* * * * *

(2) Voluntary departure

(A) In general

Subject to subparagraph (B), any alien allowed to depart voluntarily under section 1254(e)(1) of this title or who has agreed to depart voluntarily at his own expense under section 1252(b)(1) of this title who remains in the United States after the scheduled date of departure, other than because of exceptional circumstances, shall not be eligible for relief described in paragraph (5) for a period of 5 years after the scheduled date of departure or the date of unlawful reentry, respectively.

* * * * *

(5) Relief covered

The relief described in this paragraph is—

(A) relief under section 1182(c) of this title,

(B) voluntary departure under section 1252(b)(1) of this title,

(C) suspension of deportation or voluntary departure under section 1254 of this title, and

(D) adjustment or change of status under section 1255, 1258, or 1259 of this title.

(f) Definitions

In this section:

* * * * *

(2) The term "exceptional circumstances" refers to exceptional circumstances (such as serious illness of the alien or death of an immediate relative of the alien, but not including less compelling circumstances) beyond the control of the alien.

7. 8 C.F.R. 1003.2 provides in part:

Reopening or reconsideration before the Board of Immigration Appeals.

(a) *General.* The Board may at any time reopen or reconsider on its own motion any case in which it has rendered a decision. A request to reopen or reconsider any case in which a decision has been made by the Board, which request is made by the Service, or by the party affected by the decision, must be in the form of a written motion to the Board. The decision to grant or deny a motion to reopen or reconsider is within the discretion of the Board, subject to the restrictions of this section. The Board has discretion to deny a motion to reopen even if the party moving has made out a prima facie case for relief.

* * * * *

(c) *Motion to reopen.* (1) A motion to reopen proceedings shall state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits or other evidentiary material. A motion to reopen proceedings for the purpose of submitting an application for relief must be accompanied by the appropriate application for relief and all supporting documentation. A motion to reopen proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears that the alien's right to apply for such relief was fully explained to him or her and an opportunity to apply

therefore was afforded at the former hearing, unless the relief is sought on the basis of circumstances that have arisen subsequent to the hearing. Subject to the other requirements and restrictions of this section, and notwithstanding the provisions in § 1001.1(p) of this chapter, a motion to reopen proceedings for consideration or further consideration of an application for relief under section 212(C) of the Act (8 U.S.C. 1182(c) may be granted if the alien demonstrates that he or she was statutorily eligible for such relief prior to the entry of the administratively final order of deportation.

* * * * *

(d) *Departure, deportation, or removal.* A motion to reopen or a motion to reconsider shall not be made by or on behalf of a person who is the subject of exclusion, deportation, or removal proceedings subsequent to his or her departure from the United States. Any departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider, shall constitute a withdrawal of such motion.

* * * * *

(f) *Stay of deportation.* Except where a motion is filed pursuant to the provisions of §§ 1003.23(b)(4)(ii) and 1003.23(b)(4)(iii)(A), the filing of a motion to reopen or a motion to reconsider shall not stay the execution of any decision made in the case. Execution of such decision shall proceed unless a stay of execution is specifically granted by the Board, the Immigration Judge, or an authorized officer of the Service.

8. 8 C.F.R. 1240.26 provides in part:

Volutary departure—authority of the Executive Office for Immigration Review.

* * * * *

(d) *Alternate order of removal.* Upon granting a request made for voluntary departure either prior to the completion of proceedings or at the conclusion of proceedings, the immigration judge shall also enter an alternate order or removal.

* * * * *

(f) *Extension of time to depart.* Authority to extend the time within which to depart voluntarily specified initially by an immigration judge or the Board is only within the jurisdiction of the district director, the Deputy Executive Associate Commissioner for Detention and Removal, or the Director of the Office of Juvenile Affairs. An immigration judge or the Board may reinstate voluntary departure in a removal proceeding that has been reopened for a purpose other than solely making an application for voluntarily departure if reopening was granted prior to the expiration of the original period of voluntary departure. In no event can the total period of time, including any extension, exceed 120 days or 60 days as set forth in section 240B of the Act.

* * * * *

(h) *Reinstatement of voluntary departure.* An immigration judge or the Board may reinstate voluntary departure in a removal proceeding that has been reopened for a purpose other than solely making application for voluntary departure, if reopening was granted prior to the expiration of the original period of voluntary depar-

ture. In no event can the total period of time, including any extension, exceed 120 days or 60 days as set forth in section 240B of the Act and paragraph (a) of this section.

9. 8 C.F.R. § 1241.1 provides:

Final order of removal.

An order of removal made by the immigration judge at the conclusion of proceedings under section 240 of the Act shall become final:

(a) Upon dismissal of an appeal by the Board of Immigration Appeals;

(b) Upon waiver of appeal by the respondent;

(c) Upon expiration of the time allotted for an appeal if the respondent does not file an appeal within that time;

(d) If certified to the Board or Attorney General, upon the date of the subsequent decision ordering removal;

(e) If an immigration judge orders an alien removed in the alien's absence, immediately upon entry of such order; or

10. 8 C.F.R. 3.2 (1995) provided:

Reopening or reconsideration.

The Board may on its own motion reopen or reconsider any case in which it has rendered a decision. Reopening or reconsideration of any case in which a decision has been made by the Board, whether requested by the commissioner or any other duly authorized officer of

No. 06-1181

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v.

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FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE RESPONDENT

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By order dated January 14, 2008, the Court directed the parties to file supplemental briefs addressing: "Whether an alien who has been granted voluntary departure and has filed a timely motion to reopen should be permitted to withdraw the request for voluntary departure prior to the expiration of the departure period."[1]

In the experience of the Attorney General, it is extraordinarily rare for an alien who has requested and been granted voluntary departure by the BIA to seek to withdraw from that arrangement within the voluntary depar-

[1] We have been informed by the Department of Homeland Security (DHS) that, on January 10, 2008, the immediate relative visa petition that formed the basis for petitioner's request to reopen his removal proceedings was denied on the ground that it was based on a sham marriage contracted solely for immigration benefits. Petitioner's wife has 30 days from the date of that denial to file with DHS a notice of appeal to the Board of Immigration Appeals (BIA or Board). 8 C.F.R. 1003.1(b)(5), 1003.3(a)(2).

ture period specified in the Board's order. The subject is not directly addressed in the Immigration and Nationality Act (INA or Act), 8 U.S.C. 1101 *et seq.*, the Attorney General's current regulations, or any precedential decision of the BIA, and the government is not aware of any on-point decision by a court of appeals.[2]

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[2] The absence of court of appeals decisions probably is due to the courts' practice of granting judicial stays of voluntary departure. Outside limited circumstances not applicable here, 8 U.S.C. 1229a(c)(7)(C)(iv) (Supp. V 2005); 8 C.F.R. 1003.23(b)(4)(ii), the filing of a motion to reopen removal proceedings neither suspends the finality and appealability of the underlying order, nor tolls the period for seeking judicial review. *Stone* v. *INS*, 514 U.S. 386 (1995). Accordingly, an alien who wishes to seek judicial review of a BIA decision rejecting his other claims for relief but granting his request for voluntary departure must file a petition for review within 30 days. 8 U.S.C. 1252(b)(1). In the experience of the Attorney General, "aliens who have been granted voluntary departure routinely file [such] petitions * * * and seek a stay" from the courts of appeals. 72 Fed. Reg. 67,681 (2007). Although the government's position is that reviewing courts lack the authority to stay the expiration of a voluntary departure period, eight courts of appeals have reached a contrary conclusion, Gov't Mem. in Opp. at 13-17, *Gulati* v. *Mukasey*, No. 07A576 (filed Jan. 14, 2008), stay granted (Jan. 15, 2008) (Stevens, J.), and the Ninth Circuit has adopted a standing order under which an alien's motion to stay generates an automatic stay of both removal and voluntary departure "until further order of the court," 9th Cir. Gen. Order 6.4(c)(1); see *Desta* v. *Ashcroft*, 365 F.3d 741, 749-750 (9th Cir. 2004).

Because a stay of the voluntary departure period permits an alien simultaneously to retain the benefits of voluntary departure and to avoid the consequences of failing to depart within the time specified in the BIA's order, most aliens currently have no incentive to seek to withdraw a previously granted request for voluntary departure. Under the Attorney General's proposed regulations, these issues of stay practice would not arise, because the filing of a petition for review would automatically terminate the grant of voluntary departure. 72 Fed. Reg. at 67,674.

In the government's view, the proper answer to the question posed by the Court has four parts. First, an alien's unilateral assertion that he no longer wishes to be bound by his agreement to depart the United States within a specified time by itself neither modifies the BIA order providing for voluntary departure, nor excuses the alien's failure to comply with its terms. Second, the BIA has considerable discretion in deciding whether to grant an alien's motion to reopen his removal proceedings to allow him to withdraw a previously granted request for voluntary departure. Third, the record discloses at least two bases upon which the BIA could reasonably have denied petitioner's request in this case. Fourth, the Attorney General's proposed regulations, which would not in any event apply to this case, do not warrant a different result.

1. At the time he sought to withdraw his request for voluntary departure, petitioner was subject to a final order of the BIA. That order provided that petitioner was "permitted to voluntarily depart from the United States * * * within 30 days from the date of [the] order or any extension beyond that time as may be granted by the Department of Homeland Security (DHS)." Pet. App. 5. The order further warned, however, that, "[i]n the event [petitioner] fail[ed] to so depart," the alternate order of removal would take effect automatically and he would be subject to various penalties. *Id.* at 5-6. Nothing in the order or underlying bargain gave petitioner the option of deferring the final order of removal for 28 days without the other terms of the bargain. And nothing in the INA, the Attorney General's regulations, or the BIA's order provides that petitioner's declaration that he was "withdraw[ing] his request for voluntary departure" (A.R. 13) was by itself sufficient to alter the

terms of the BIA's final order. The only mechanism for altering that order (and thus avoiding the consequences of failing to depart within the time specified in that order) was through a motion to reopen under 8 U.S.C. 1229a(c)(7) (Supp. V 2005) or a motion to reconsider under 8 U.S.C. 1229a(c)(6) (Supp. V 2005). See 72 Fed. Reg. 67,676 n.1 (2007).

The fact that voluntary departure is a form of discretionary relief that was originally granted upon petitioner's request does not alter the analysis. The government also benefits from the voluntary-departure bargain once it is agreed to. See 72 Fed. Reg. at 67,674 (describing voluntary departure as "an agreed upon exchange of benefits"). And it is black-letter law that, at least absent extraordinary circumstances, one party may not unilaterally withdraw from what was initially an entirely voluntary arrangement on the eve of his own performance. A party may of course unilaterally *repudiate* a voluntarily incurred obligation, but repudiation is generally treated as a total breach, see Restatement (Second) of Contracts § 253(a) (1979), and both the INA and the BIA's order clearly specified the consequences if petitioner defaulted on his obligation to depart within the specified time. 8 U.S.C. 1229c(b)(3); 8 U.S.C. 1229c(d)(1) (Supp. V 2005); Pet. App. 5-6.

2. Nothing in the INA or the Attorney General's implementing regulations *requires* the BIA to grant a motion to reopen to allow an alien to withdraw a previously granted request for voluntary departure. To the contrary, whether to grant reopening is at all times a matter of discretion, 8 C.F.R. 1003.2(a); *INS* v. *Phinpathya*, 464 U.S. 183, 188 n.6 (1984), and the BIA therefore has broad latitude in deciding whether to do so.

An alien is granted voluntary departure at the conclusion of removal proceedings only if the IJ has rejected *all* of the alien's asserted bases for remaining in the United States *and* the alien "has established by clear and convincing evidence that [he] * * * intends to" depart if voluntary departure is granted. 8 U.S.C. 1229c(b)(1)(D). The alien may then appeal to the BIA, which prevents the IJ's order from becoming final and suspends the voluntary departure period pending appeal. 8 U.S.C. 1101(a)(47)(B)(i), 1229c(b)(1). At any point while the appeal is pending—a period that in this case lasted nearly fourteen months, Pet. App. 5, 7—the alien may file a motion to remand to the IJ if he has new evidence bearing on his eligibility to remain in the United States. 8 C.F.R. 1003.2(c)(4); see 72 Fed. Reg. at 67,676 n.1. The alien may also, while his appeal is pending, file a motion with the BIA to withdraw his request for voluntary departure. See, *e.g.*, *In re Lopez Vazquez*, No. A78-884-763, 2007 WL 2588534 (B.I.A. Aug. 17, 2007) (unpublished) (granting such a motion). Accordingly, absent a mistake, the BIA will enter a final order granting voluntary departure *only* in situations in which the alien originally sought voluntary departure from the IJ and then failed to withdraw that request while his appeal was pending with the BIA.

Congress has provided that a subsequent motion to reopen must be based on "new facts." 8 U.S.C. 1229a(c)(7)(B) (Supp. V 2005); see 8 C.F.R. 1003.2(c)(1) (reopening must be based on "evidence [that] * * * was not available and could not have been discovered or presented at the former hearing").[3] The BIA could rea-

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[3] At oral argument, the Chief Justice inquired about what percentage of motions to reopen are granted in favor of the alien. 1/10/08 Tr. 5, 50.

sonably conclude that, at least as a general matter, no genuinely new reason for withdrawing a request for voluntary departure is likely to arise during the short voluntary departure period specified in the Board's order. As a result, the Board could further reasonably conclude that an alien's post-final order request to do so should be scrutinized closely to determine if it reflects anything more than last-minute regret.

3. The record discloses at least two bases upon which the BIA could have denied what it characterized as petitioner's request to "be permitted to withdraw his request for voluntary departure." Pet. App. 3. First, the Board could have concluded that petitioner's subsequent overstay of his voluntary departure period had rendered moot his pre-overstay request, because he was no longer eligible for adjustment of status, the ultimate relief he sought through his motion. See *Chedad* v. *Gonzales*, 497 F.3d 57, 64-65 (1st Cir. 2007) (holding that a subsequent grant of reopening does not remove the consequences that attach automatically upon an alien's "fail[ure] * * * to depart * * * within the time period specified," even if the motion to reopen was filed prior to ex-

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Due to limitations in data recording, the Department of Justice's Executive Office for Immigration Review (EOIR) can report on case dispositions, but not whether a given decision was "favorable" to an alien. EOIR did inform this Office that in fiscal year 2007, the BIA adjudicated 7804 motions to reopen that were filed by aliens alone rather than jointly with DHS. Some form of "relief" was granted in connection with 1178 of these motions, with that term being defined to include all situations in which reopening was granted for any purpose, rather than only those in which the alien ultimately obtained a modification of the original order. Of the remaining motions, 6273 resulted in "no relief," with the remaining 353 dispositions being classified as "other." If these 353 dispositions are excluded from the calculation, 15.8% of aliens' motions to reopen were granted.

piration of the voluntary departure period (quoting 8 U.S.C. 1229c(d)(1)); but cf. *Orichitch* v. *Gonzales*, 421 F.3d 595, 598 (7th Cir. 2005) (reaching contrary conclusion in case involving joint motion to reopen). Such a conclusion would work no unfairness in petitioner's case. Petitioner filed his motion on the last business day in the 30-day period during which permission to depart voluntarily under the BIA's order was to remain valid. Although he was represented by counsel, petitioner did not ask the BIA to expedite consideration of his motion and at the same time seek an extension of his voluntary departure period from DHS to afford the BIA time to act on his motion. See Pet. App. 5; 8 C.F.R. 1240.26(f); A.R. 10-21.

Second, even if the BIA viewed itself as having the *authority*, by granting petitioner's motion to reopen, to eliminate retrospectively the consequences of his failure to depart within the time specified in its previous order, the BIA could reasonably have determined that petitioner had presented no sound basis for it to exercise its discretion to do so. Petitioner sought to eliminate his obligation to depart in order to seek adjustment of status based on a marriage that occurred in 1999, five years *before* he first sought voluntary departure from the IJ. Pet. App. 8-9. At no point in the nearly fourteen months during which his appeal to the BIA was pending did petitioner seek a remand to the IJ or inform the Board that he wished to withdraw his request for voluntary departure. Rather, it was only *after* the BIA had rejected his challenge to removal and entered a final order that he informed the Board that he wanted to withdraw his request for voluntary departure to permit him to seek further consideration of the same underlying adjustment of status claim. A.R. 10. Under these circum-

stances, it would have been entirely reasonable for the BIA to conclude that petitioner had not presented any "new facts" (see 8 U.S.C. 1229a(c)(7)(B) (Supp. V 2005)), and therefore had not satisfied that statutory prerequisite for reopening to eliminate the voluntary departure provisions of the final order—or the Board could have decided in these circumstances to deny the motion to reopen simply as a matter of discretion.

Although the BIA's decision is perhaps best read as denying petitioner's request on the first ground, see Pet. App. 4 (stating that "because [petitioner] has remained in the United States after the scheduled date of departure, [he] is no[w] statutorily ineligible for the relief sought"); A.R. 2, the matter is not entirely clear. Given the discretionary nature of motions to reopen, the great volume of the Board's work, and its need to focus its efforts on its core function of adjudicating appeals rather than on ancillary motions, the Board should not be expected to write a detailed opinion (or often any opinion) when it denies such a motion. But because this Court is "a court of review, not of first view," *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005), in the event the Court determines that the Board should have given a fuller explanation for denying petitioner's request, the proper course would be to remand to the Board for further proceedings. See *INS* v. *Ventura*, 537 U.S. 12 (2002) (per curiam); *Gonzales* v. *Thomas*, 547 U.S. 183 (2006) (per curiam).[4]

4. The proposed rule that was issued by the Attorney General on November 30, 2007, does not warrant a different result here. That rule has not been adopted,

[4] The court of appeals did not directly address the issue, although it noted that petitioner sought "leave to withdraw his request for voluntary departure." Pet. App. 2.

and will not apply to petitioner's case if it is. See 72 Fed. Reg. at 67,682 ("The provisions of this proposed rule will be applied * * * only with respect to immigration judge orders issued on or after the effective date of the final rule that grant a period of voluntary departure.").

At any rate, the proposed rule is fully consistent with the conclusion that, under the current regulations and the BIA's final order, petitioner's mere assertion that he wished to withdraw from a voluntary departure arrangement does not excuse him from the consequences of failing to depart within the time specified in the Board's order. The proposed rule would alter the up-front "quid pro quo" between the government and the alien, 72 Fed. Reg. at 67,675, expressly to provide "that permission to depart voluntarily is conditioned upon the alien's agreeing to accept the finality of the Board's order * * * and depart within the period allowed * * * without seeking to challenge the final order by filing a motion to reopen or reconsider," *id.* at 67,679. See 8 U.S.C. 1229c(e) (providing that the Attorney General may "by regulation limit eligibility for voluntary departure * * * for any class or classes of aliens"). The rule thus would provide that an alien's violation of those terms of the bargain would result in the *automatic termination* of the alien's permission to depart voluntarily. See 72 Fed. Reg. at 67,686 (proposed 8 C.F.R. 1240.26(b)(3)(iii)) (providing that the IJ "shall advise the alien of" the consequences of filing "a post-decision motion to reopen or reconsider"). The premise of the proposed rule, however, is that the terms of the up-front agreement must be changed to effect this result. It thus undermines any argument that petitioner possesses a unilateral right to terminate under the current regulations.

Nor does the proposed rule suggest that the Attorney General is *required* to provide every alien who requests and is granted voluntary departure with a mechanism to escape the consequences of not departing within the specified time. Congress has granted the Attorney General broad authority with respect to removal of aliens generally, 8 U.S.C. 1103(g) (Supp. V 2005), and voluntary departure in particular, 8 U.S.C. 1229c(a)(1), (b)(1) and (e). In the event the Attorney General promulgates the proposed rule, it will represent his expert judgment that doing so will improve the overall functioning of the removal process in general and voluntary departure in particular. If such a system were adopted by regulation, IJs and the BIA could in the future take into account the risk of strategic behavior when deciding whether to grant voluntary departure in a particular case. The Attorney General could also modify the regulations if he later determined that the risks of abuse outweighed the rule's other benefits. But in all events the system envisioned by the proposed regulations is not the one under which petitioner sought, was given, and later attempted to withdraw from a grant of permission to depart voluntarily in lieu of a formal order of removal, nor is it one that should be imposed by this Court as a matter of law rather than by the Attorney General in the exercise of his discretion.

CONCLUSION

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

JANUARY 2008

No. 06-1181

IN THE

Supreme Court of the United States

SAMSON TAIWO ADA,

Petitioner,

v.

MICHAEL B. MUKASEY,
ATTORNEY GENERAL,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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This Court ordered briefing on the question "[w]hether an alien who has been granted voluntary departure and has filed a timely motion to reopen should be permitted to withdraw the request for voluntary departure prior to the expiration of the departure period." Permitting withdrawal offers an alternative to tolling that properly reconciles the statutory provisions. That the statute permits such a construction is demonstrated by the Department of Justice's own proposed rule, which would permit an alien to "withdraw from the arrangement into which he or she effectively entered ... at the time of seeking and accepting voluntary departure" and pursue a motion to reopen. 72 Fed. Reg. 67,674, 67,679 (Nov. 30, 2007).

Accordingly, if the Court does not adopt a tolling construction, it should interpret the statute to permit Petitioner to withdraw his voluntary departure request, which he expressly sought to do, so that he can pursue his motion to reopen.

STATUTORY AND REGULATORY BACKGROUND

1. This case concerns two provisions of the INA, one governing voluntary departure, and the other addressing motions to reopen. Voluntary departure is a discretionary form of relief available to aliens who meet certain criteria. 8 U.S.C. § 1229c(a)(1), (b)(1). An alien who contests his removal—seeking, for example, adjustment of status, cancellation of removal, or asylum—remains eligible for voluntary departure. *Id.* § 1229c(b)(1). If an immigration judge denies relief from removal, the immigration judge may then grant the alien voluntary departure, setting a period of up to 60 days for the alien to depart the country. *Id.* § 1229c(b)(2). An alien granted voluntary departure is not subject to a final order of removal; rather, the immigration judge enters an "alternate order o[f] re-

moval," 8 C.F.R. § 1240.26(d), which takes effect if the alien does not depart during the voluntary departure period, *id.* § 1241.1(f).

Under the statute and regulations, an alien granted voluntary departure does not waive rights to seek further review. The alien may file an appeal with the Board of Immigration Appeals, challenging the denial of any underlying relief, such as adjustment of status or cancellation of removal. The alien's voluntary departure period is "toll[ed]" during this administrative appeal. *Matter of A-M-*, 23 I. & N. Dec. 737, 743 (BIA 2005). Once an alien receives a final decision from the BIA, he may appeal to the court of appeals by filing a petition for review. 8 U.S.C. § 1252(a). In most circuits, the court can stay the voluntary departure period pending this review. *See* Reply Br. 14 n.9; Gov't Br. 35-36 & n.15.

2. The INA provides that all aliens, including those granted voluntary departure, may also file one motion to reopen, based on "new facts," within 90 days of the agency's final decision. 8 U.S.C. § 1229a(c)(7)(B), (C)(i). These new facts can relate, for example, to the health of an alien's family member or a change in the immigration status of a spouse. *See id.* § 1229b(b)(1)(D) (cancellation of removal available when removal would cause "exceptional and extremely unusual hardship" to a United States citizen or lawful permanent resident who is the spouse, parent, or child of the alien); *id.* §§ 1151(b)(2)(A)(i), 1154(a), 1255(a) (adjustment of status available when a spouse naturalizes to become a United States citizen); *see also, e.g.*, *Matter of Diaz-Ruacho*, 24 I. & N. Dec. 47, 48, 51 (BIA 2006) (alien's parents diagnosed with serious health problems; motion to reopen granted); *Chedad* v. *Gonzales*, 497 F.3d 57, 59-60 (1st Cir. 2007) (alien's spouse naturalized to be-

come a United States citizen; motion to reopen initially granted).

Under the agency's regulations, motions to reopen can only be resolved if the alien is in the country; if an alien departs, then reopening is unavailable. 8 C.F.R. § 1003.2(d). Nor, in many cases, can the alien simply leave the country and pursue the underlying relief from abroad; for many aliens (including Petitioner), the alien will be subject to "unlawful presence" bars upon departure. These bars prevent readmission for up to 10 years and are triggered by any departure from the country, including voluntary departure. *See* 8 U.S.C. § 1182(a)(9)(B)(i)(II); *see also* 4 Gordon, et al., *Immigration Law and Procedure* §§ 51.01(3), 51.03(3) (2007).[1]

Although those aliens subject to a final removal order may seek an administrative stay, thereby permitting adjudication of the motion to reopen while the alien remains in the country, *see* 8 C.F.R. §§ 1003.2(f), 241.6, these stays are not available to voluntary departure recipients, *see* Reply Br. 13-14.

ARGUMENT

The question in this case is how to reconcile the voluntary departure and motion to reopen provisions. This Court has requested supplemental briefing on one possible approach: permit an alien who has been granted voluntary departure and has filed a timely motion to reopen to withdraw the request for voluntary departure prior to the expiration of the voluntary de-

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[1] The prevalence of unlawful presence bars is apparent from the cases in the circuit split at issue here; in six of the seven cases, it appears that the alien's departure would have triggered a 10-year unlawful presence bar. *See* American Immigration Law Foundation Amicus Br. 8 & n.6.

parture period. Withdrawal is consistent with the statute—giving content to both the voluntary departure and motion to reopen provisions—and permissible under the agency's current and proposed regulations. If the Court does not adopt a tolling construction, it should permit an alien filing a timely motion to reopen to withdraw his request for voluntary departure.

I. PERMITTING WITHDRAWAL PROPERLY RECONCILES THE TWO STATUTORY PROVISIONS

Permitting withdrawal, like tolling, avoids the unworkable trap that the Government's reading would impose on aliens and, in turn, harmonizes the statutory provisions.

1. In the current litigation, the Government has rejected statutory constructions that give content to both the voluntary departure and motion to reopen provisions. Instead, the Government would place an alien faced with changed circumstances in a trap, leaving the availability of a motion to reopen to chance. The alien must either (1) depart the country within the voluntary departure period (thereby losing the ability to pursue reopening and, in many cases, rendering him subject to statutory bars on readmission for up to 10 years) or (2) remain in the country awaiting a decision on the motion to reopen, risking staying past the voluntary departure period, which will not only render the alien ineligible for the very relief sought, but also subject him to additional statutory penalties, 8 U.S.C. § 1229c(d)(1). In this lose-lose scenario, because the alien had obtained voluntary departure at an earlier point in time, he has effectively lost his ability to pursue a motion to reopen based on changed circumstances.

The Government rationalizes this result by arguing that it is part of a quid pro quo that the alien agreed to

when he was granted voluntary departure. Yet the Government agrees that the alien can file a motion to reopen and, if the agency happens to act quickly enough, the alien can receive an adjudication of that motion; thus, the Government agrees that adjudication of a motion to reopen has not been relinquished. Moreover, the Department's proposed rule necessarily rejects the notion that Congress intended aliens to forfeit motions to reopen as part of a voluntary departure bargain; the proposed rule "is intended to allow an opportunity for aliens who have been granted voluntary departure to be able to pursue administrative motions [including motions to reopen] without risking the imposition of the voluntary departure penalties." 72 Fed. Reg. 67,674, 67,679 (Nov. 30, 2007).

Given that the Government's trap, which effectively eliminates motions to reopen for these aliens, is not required by a statutory quid pro quo, it makes little sense to interpret the statute to yield this arbitrary result.[2] The tolling construction that Petitioner favors avoids this trap and, in so doing, properly reconciles the statutory provisions. Permitting withdrawal provides a similarly viable interpretation of the statute.

2. Nearly all of the arguments that Petitioner presented in support of a tolling construction apply equally to an interpretation that permits withdrawal.

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[2] Indeed, the Government appears to have ended up in its current litigation position as a result of agency inaction. In 1997, the Department suggested tolling as a possible solution. 62 Fed. Reg. 10,312, 10,325-10,326 (Mar. 6, 1997). Now, approximately ten years later, the Department has proposed prospective regulations that permit withdrawal—thereby preserving motions to reopen for those who have been granted voluntary departure. 72 Fed. Reg. at 67,679.

See Pet. Br. Parts I.A-C, II; Reply Br. Part I. When the statute is interpreted as a whole, it must be read to safeguard access to motions to reopen for aliens granted voluntary departure. Like tolling, withdrawal does so, while also respecting the limits on motions to reopen and voluntary departure set by Congress.

Under a withdrawal construction, the alien filing a motion to reopen would—like Petitioner in this case[3]—seek withdrawal of the voluntary departure request,[4] which would be effective immediately upon filing. If withdrawal were not effective immediately (but, rather, needed to be acted upon by the agency), then the same problems would exist as under the Government's current construction—withdrawal, and motions to reopen in turn, would be dependent on whether the agency happened to act in time.[5]

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[3] Petitioner requested this relief before the BIA and raised the issue at every stage of the proceeding. Reply Br. 20 & n.14.

[4] The Court could also construe the statute such that the filing of a motion to reopen by an alien granted voluntary departure would trigger withdrawal from voluntary departure (thus also reaching aliens who did not request withdrawal expressly). The Department's proposed rule takes this approach. 72 Fed. Reg. at 67,679; *see also* Part II.1 *infra*. The Court may consider the Department's prospective solution and interpret the statute consistent with it. *Cf. S.D. Warren Co.* v. *Maine Bd. of Envtl. Prot.*, 126 S. Ct. 1843, 1848-1849 (2006) (confirming understanding of disputed statutory term based on agencies' interpretation even though the interpretation was not "formally settled"); *Wisconsin Dep't of Health & Family Servs.* v. *Blumer*, 534 U.S. 473, 496-497 (2002) (adopting interpretation that was consistent with agency's "recently proposed rule").

[5] The Department agrees that automatic withdrawal—effective without an agency decision—is consistent with the statute. *See* 72 Fed. Reg. at 67,679, 67,682, 67,683.

Upon withdrawal, the alien would give up the benefits of voluntary departure, but be able to pursue a motion to reopen in light of changed circumstances. The alien would be in the same position as other aliens who were not granted voluntary departure: the alien would be subject to a final order of removal, *cf.* 8 C.F.R. § 1240.26(d), but, like other aliens subject to a final removal order, could seek an administrative stay of removal, *see id.* §§ 1003.2(f), 241.6.[6]

Permitting withdrawal thus avoids the trap created by the Government's reading by safeguarding motions to reopen for voluntary departure recipients. Moreover, because the aliens seeking motions to reopen are placed in the same position as other aliens who were not granted voluntary departure, withdrawal retains Congress's limits on the period in which an alien may depart the country voluntarily and would not invite any abuse.

II. THE DEPARTMENT OF JUSTICE'S PROPOSED RULE AND CURRENT AGENCY REGULATIONS AND PRACTICE OFFER FURTHER SUPPORT FOR PERMITTING WITHDRAWAL

1. The Department agrees that permitting an alien to withdraw his request for voluntary departure, so as to permit him to pursue a motion to reopen, is consistent with the statute. In fact, the Department has proposed such a solution prospectively.

According to the Department, "[t]he voluntary departure statute does not unambiguously provide that permission to depart voluntarily is irrevocable once granted." *See* 72 Fed. Reg. at 67,679. Rather, the stat-

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[6] Such administrative stays are not available during the voluntary departure period. *See* Reply Br. 13-14.

ute permits a construction whereby the filing of a motion to reopen causes the voluntary departure grant to automatically terminate. *See id.* Under the Department's proposal, "[t]he alien will be free to forgo voluntary departure and instead to elect to challenge the final order through a motion to reopen or reconsider." *Id.*

> Or, put another way, these rules would allow the alien an opportunity to withdraw from the arrangement into which he or she effectively entered ... at the time of seeking and accepting voluntary departure[.]

Id. Although not binding in the present case, the proposed rule demonstrates that the Department agrees that withdrawal (that is effective immediately) is consistent with the statute.

2. Withdrawal from voluntary departure in order to pursue a motion to reopen is also consistent with the current regulatory framework. The Government correctly observed that there are no regulations prohibiting an alien from withdrawing a voluntary departure request so as to pursue a motion to reopen. *See* Oral Argument Tr. 32.

The agency, moreover, has permitted withdrawal under the current statutory and regulatory regime. *See Matter of Davis*, No. A76-832-166 (BIA Mar. 3, 2006) (unpublished) ("*Davis* 2006 Order").[7] *Davis* presents a strikingly similar factual scenario to the present case—except that Davis was *permitted* to withdraw the

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[7] Pursuant to Supreme Court Rule 32.3, counsel for Petitioner has sought permission to lodge the cited materials relating to *Davis* with the Clerk of the Court.

voluntary departure request, and obtain an adjudication of the motion to reopen, but Petitioner was not.

In *Davis*, as in the present case, the alien, who was married to a U.S. citizen, filed a motion to reopen, under *Matter of Velarde*, 23 I. & N. Dec. 253 (BIA 2002), and *Matter of Isber*, 20 I. & N. Dec. 676 (BIA 1993), and submitted evidence that the marriage was bona fide.[8] As in this case, Davis filed the motion to reopen with just a few days left in the voluntary departure period: Davis filed on Friday, December 2, 2005, and Davis's voluntary departure period was to expire just two days later (on Sunday, December 4).[9] When filing the motion—and using the identical language that Petitioner used in the present case—Davis sought to withdraw the voluntary departure request and, instead, be subject to a final order of removal.[10]

The BIA acted on Davis's motion approximately three months later, which, as in Petitioner's case, was after the voluntary departure period had expired. *Davis* 2006 Order. But unlike in the present case—and despite the parallel fact patterns and that the respec-

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[8] *Compare Matter of Davis*, Motion to Reopen/Reconsider and to Withdraw Request for Voluntary Departure and Request for Stay of Deportation 3-8 (BIA Dec. 1, 2005) ("*Davis* Mot.") *with* C.A. App. 11-14.

[9] *See Matter of Davis*, No. A76-832-166 (BIA Oct. 5, 2005) (unpublished); *Matter of Davis*, No. A76-832-166, Mot. Filing Receipt (Dec. 5, 2005).

[10] *Compare Davis* Mot. 7 ("[T]he respondent withdraws his request for voluntary departure and accepts an order of deportation.") *with* C.A. App. 13 (same).

tive motions were filed *on the same day*[11]—the Board permitted Davis to withdraw the request for voluntary departure. *Id.*[12] As a result, Davis was not subject to the penalties for overstaying the voluntary departure period, and the Board adjudicated the motion to reopen on the merits.[13]

3. The agency's regulations and precedent also permit termination of voluntary departure in other contexts, offering further support for withdrawal. For example, if an alien fails to post the required bond within five business days, then the voluntary departure order will "vacate automatically" and the alien will be subject to a final order of removal. 8 C.F.R. § 1240.26(c)(3).[14] As a result, an alien who has failed to post the required bond is not subject to penalties for overstaying and, therefore, may obtain an adjudication of his motion to reopen. *Matter of Diaz-Ruacho*, 24 I. & N. Dec. 47, 51 (BIA 2006).

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[11] Both motions to reopen are dated December 1, 2005 and were filed with the BIA on December 2, 2005. *Compare Davis* Mot. 12; *Davis* Mot. Filing Receipt *with* C.A. App. 3, 21.

[12] The Board stated that, in light of Davis's request to withdraw, it would not "reinstate voluntary departure" but would instead "enter an order of removal." *Davis* 2006 Order.

[13] The Board denied Davis's motion to reopen, undermining any argument that the withdrawal was based on the merits of the underlying motion. *See Davis* 2006 Order.

[14] Similarly, an alien's voluntary departure order will "vacate automatically" if the alien fails to provide the Government with his passport or other required travel documentation. 8 C.F.R. § 1240.26(b)(3)(ii); *see also id.* § 240.25(f) (voluntary departure "revo[cable] without advance notice" if the request "should not have been granted").

In *Diaz-Ruacho*, the alien was granted voluntary departure and later filed a motion to reopen. Notwithstanding the fact that the alien filed the motion to reopen almost one month *after* the end of the voluntary departure period, the Board granted the motion. The BIA held that because the alien had failed to post the required bond, he was not subject to penalties for overstaying the voluntary departure period. These penalties "did not attach" because the voluntary departure order had vacated once the alien failed to post bond. 24 I. & N. Dec. at 51. Thus, under the current regulations, the voluntary departure grant can automatically terminate in certain circumstances.[15]

* * *

The statutory provisions, the Department's proposed regulations, and the agency's current regulations and practice all support a construction of the statute that permits an alien granted voluntary departure to withdraw a request for voluntary departure in order to pursue a timely motion to reopen. Thus, if the Court declines to interpret the statute to permit tolling, it should construe the statute so as to permit Petitioner to withdraw his request for voluntary departure.

CONCLUSION

The judgment of the Fifth Circuit should be reversed.

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[15] The Department's proposed rule would alter this result prospectively, 72 Fed. Reg. at 67,684, but would nonetheless permit voluntary departure recipients to pursue motions to reopen, *id.* at 67,679.

Respectfully submitted.

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JANUARY 2008

No. 06-1181

IN THE

Supreme Court of the United States

SAMSON TAIWO DADA,

Petitioner,

v.

MICHAEL B. MUKASEY,
ATTORNEY GENERAL,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SUPPLEMENTAL REPLY BRIEF FOR PETITIONER

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The Government's supplemental brief obscures the fact that this case presents a question of statutory interpretation. Although the Government presents assorted arguments against permitting withdrawal, it does not, and cannot, contest that permitting withdrawal from voluntary departure, effective upon an alien's request, is consistent with the statute. Indeed, the Department of Justice's own proposed rule is predicated upon, and favors, such a construction.

The arguments that the Government presents against withdrawal—centered on the proposed rule, current agency practice, and the agency's exercise of discretion—are either irrelevant to the statutory interpretation question at issue or underscore that withdrawal is consistent with the statute. These arguments, moreover, fail to offer support for the Government's reading—a construction of the statute that would leave the availability of motions to reopen subject to chance.

ARGUMENT

1. The Government fails in its attempt to show that the proposed rule supports its position against withdrawal.

The Government ignores the central feature of the proposed rule: the rule would give "the alien an opportunity to *withdraw from the arrangement* into which he or she effectively entered ... at the time of seeking or accepting voluntary departure." 72 Fed. Reg. 67,674, 67,679 (Nov. 30, 2007) (emphasis added). Such withdrawal would be "automatic"—effective immediately upon an alien's filing of a motion to reopen (*i.e.*, it would not require any agency action). *Id.* The proposed rule thus presupposes that permitting an alien to "forgo voluntary departure and instead to elect to challenge the

final order through a motion to reopen," *id.*, is consistent with the statute.

Sidestepping the necessary implication of the proposed rule, the Government nonetheless contends (at 9) that the rule supports its view. The Government argues that the proposed rule "alter[s] the up-front 'quid pro quo'" of voluntary departure, and deduces that this change means that, under current practice, acceptance of voluntary departure requires forfeiture of a motion to reopen. *Id.* But the Government's current view of the bargain does not resolve the relevant question. Rather, the question is whether the statute itself imposes the version of the quid pro quo reflected in the Government's current argument. The proposed rule makes clear that, in the Department's view, the statute does not do so.[1]

2. The Government's reliance on current agency practice is similarly misplaced, as this practice also underscores that withdrawal upon request is consistent with the statute.

The Government states (at 5-6) that aliens may withdraw from voluntary departure while an appeal is pending before the BIA. The Government cites no statute, regulation, or precedential BIA decision in support of this position: the only authority is a single, non-precedential decision in which the BIA granted a withdrawal request made during an alien's appeal. *Matter of Lopez Vazquez*, 2007 WL 2588534 (BIA Aug.

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[1] The Government also invokes (at 4) contract law to argue that withdrawal would constitute repudiation of the quid pro quo, subjecting the alien to corresponding penalties. This argument, however, assumes that the bargain does not include a withdrawal option, and therefore begs the question posed by the Court.

17, 2007).[2] The Government suggests (at 5-6) that this (unannounced) practice of withdrawal on appeal suffices to eliminate the option of withdrawal following an appeal; new facts, it argues, are unlikely to arise in the short period following a BIA order. But the statute itself provides that an alien is permitted to file one motion to reopen, presenting new facts, *after* the BIA has ruled. 8 U.S.C. § 1229a(c)(7).

Far from showing that the statute cannot or should not be read to permit automatic withdrawal, the case cited by the Government reinforces the permissibility of withdrawal.[3] Moreover, it also indicates that withdrawal upon request is permissible: according to the Government (at 5), the agency will grant an alien's withdrawal request in all cases, "absent a mistake" by the Board.

The Government's argument highlights the oddity of its position in this litigation. It contends that an alien can automatically withdraw from voluntary departure during the potentially lengthy period during which his case is on appeal—a fourteen-month period in the present case. *See* Gov't Supp. Br. 5. The problem,

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[2] Counterbalancing the Government's single case is *Matter of Davis*, which permitted a withdrawal request that was submitted with a timely motion to reopen. *Matter of Davis*, No. A76-832-166 (BIA Mar. 3, 2006) (unpublished) ("*Davis* 2006 Order"). Withdrawal was permitted notwithstanding that Davis's "initial [visa] petition was denied based on a finding of marriage fraud" and that the motion to reopen related to a "second petition based on that same marriage." *Id.*

[3] The lack of other authority underscores that Petitioner's failure to seek withdrawal pending appeal cannot be held against him. At the time that Petitioner sought reopening, by contrast, all of the circuits to have considered the question had construed the statute to permit tolling. *See* Pet. Br. 10, 50.

the Government suggests, is permitting an additional short period of time for withdrawal during the voluntary departure period after the BIA rules—28 days in this case. *See id.* 3 (stating that Petitioner should not be permitted to "defer[] the final order of removal for 28 days"). It is unclear why these extra 28 days are such a cause for concern. The Department is apparently unconcerned, given that the proposed rule would permit withdrawal after the BIA rules. And, indeed, this short additional period for withdrawal is all that would be needed to safeguard motions to reopen for voluntary departure recipients. *See* 8 U.S.C. § 1229a(c)(7).[4]

3. Raising the specter of intrusion into agency discretion, the Government argues (at 4-6) that permitting withdrawal would require the agency first to grant the motion to reopen. The Government has it backwards: withdrawal permits an alien to pursue a motion to reopen, thereby leaving the agency to exercise its discretion, not the other way around.

The Government does not cite any authority for the notion that withdrawal is contingent on the agency

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[4] The Government argues (at 1-2 & n.2) that requests for withdrawal are rare and attributes that to the courts of appeals' practice of granting stays during the adjudication of petitions for review (*i.e.*, judicial review of the BIA's determination). The frequency of withdrawal requests, however, is irrelevant. More importantly, the suggestion that withdrawal is somehow unnecessary because of stays pending judicial review is misplaced. The issue here is obtaining a decision on a motion to reopen from the BIA; such motions are based on new facts and changed circumstances, factors that are not considered during judicial review. And voluntary departure recipients cannot obtain a stay of the departure period for the purpose of pursuing reopening. *See* Pet. Reply Br. 13-14.

granting a motion to reopen. In fact, the Department's proposed rule is to the contrary: it permits an alien to withdraw automatically from voluntary departure, in order to pursue a motion to reopen. *See* 72 Fed. Reg. at 67,679. *Matter of Davis* is also inconsistent with the Government's view. *See Davis* 2006 Order (permitting alien's request to withdraw from voluntary departure and denying the motion to reopen on the merits).[5]

A construction of the statute that permits withdrawal thus in no way intrudes upon the agency's discretion to grant or deny a motion to reopen. In fact, it allows the agency to exercise its discretion in each particular case.

4. The Government attempts to avoid a decision in this case by pointing to newfound ambiguity in the BIA decision that supposedly warrants a remand for clarification. The nature of the purported ambiguity is unclear; the Government appears to be suggesting that rather than denying reopening on the grounds that Petitioner had overstayed the voluntary departure period, the BIA may have actually either (a) rejected the motion for reopening on the merits or (b) rejected the request for withdrawal, finding it similarly unwarranted. Gov't Supp. Br. 6-8.[6] The arguments for ambiguity—and remand for clarification—fail.

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[5] Nor is Petitioner seeking to alter the agency's "final order." When Petitioner was granted voluntary departure, an "alternate order o[f] removal" was entered, 8 C.F.R. § 1240.26(d); *see also* C.A. App. 122, 161; rather than altering a final order, withdrawal would simply cause the alternate order of removal to go into effect.

[6] Although the Government notes (at 1 n.1) that the I-130 petition filed by Petitioner's wife was recently denied, this denial is irrelevant to the questions in this case. As an initial matter, the regulations provide for a right of appeal, 8 C.F.R. § 204.2(a)(3), and

The BIA plainly did not address the merits of the motion to reopen, refusing to consider it because Petitioner had overstayed the voluntary departure period. The Board's order states: "[A]n alien who fails to depart following a grant of voluntary departure ... is statutorily barred from applying for certain forms of discretionary relief.... Therefore, because the respondent has remained in the United States after the scheduled date of departure, the respondent is now statutorily ineligible for the relief sought. Accordingly, the motion to reopen is denied." C.A. App. 2.[7] The Government concedes that "the BIA's decision is perhaps best read as denying" relief because the overstay of the voluntary departure period rendered him statutorily ineligible. Gov't Supp. Br. 8.[8]

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such denials are routinely vacated on appeal. *See, e.g., Matter of Hurtado*, 2007 WL 4182269 (BIA Oct. 16, 2007) (remanding for further proceedings where the record underlying the district director's decision did not support a finding of a sham marriage); *Matter of Games*, 2007 WL 2197518 (BIA June 29, 2007) (same); *Matter of Abdelwahab*, 2007 WL 1492274 (BIA May 16, 2007) (same). The merits of Petitioner's arguments in support of reopening, moreover, are beside the point; the merits have never been considered by the BIA. *See also* n.7 *infra*.

[7] Because the agency did not rule on the merits of the motion to reopen, the Government's suggestion (at 7-8) that, had the agency addressed the merits, it would have denied the motion, is irrelevant. *See SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947); *cf. United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260, 266 (1954) (where regulations provide for the exercise of BIA discretion, the alien is entitled to have the BIA "exercise its own judgment").

[8] The Government's suggestion that the BIA may have considered the merits of the motion to reopen is further undermined by the Government's own approach to this case. The grant of certiorari on the tolling question, and the subsequent request for

This language similarly precludes any argument that the BIA addressed the withdrawal request on the merits. Moreover, even if it did, that would not resolve this case. If withdrawal is treated as requiring agency approval (rather than effective upon request), it leaves the alien in the same unworkable bind as the Government's litigation position. The withdrawal request, and motions to reopen in turn, would be subject to the timing of agency decision-making. *See* Pet. Supp. Br. 6.

5. Finally, the Government argues (at 10) that this Court should leave the reconciliation of the statutory provisions to the agency. The present statutory interpretation question is before this Court, however, because the agency did not exercise its delegated authority to address the issue. And now that the agency has considered the question, it has proposed regulations that (prospectively) safeguard motions to reopen for voluntary departure recipients. This Court should interpret the statute to avoid the Government's current view, which renders motions to reopen subject to chance and is inconsistent with the statute. Instead, the Court should construe the statute to preserve motions to reopen for voluntary departure recipients, through either a tolling or withdrawal construction.

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briefing on withdrawal, are predicated on the BIA's refusal to exercise its discretion on the merits. If the BIA decision could be read to provide the discretionary resolution that Petitioner seeks, one would have expected the Government to point that out when opposing a grant of the petition for certiorari. *Cf.* S. Ct. R. 15.2.

CONCLUSION

The judgment of the Fifth Circuit should be reversed.

Respectfully submitted.

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No. 06-1181

In the Supreme Court of the United States

SAMSON TAIWO DADA, PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SUPPLEMENTAL REPLY BRIEF FOR THE RESPONDENT

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In the Supreme Court of the United States

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SAMSON TAIWO DADA, PETITIONER

v.

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SUPPLEMENTAL REPLY BRIEF FOR THE RESPONDENT

1. Petitioner argues that an alien who has been granted voluntary departure by the Board of Immigration Appeals should be permitted to withdraw from that arrangement through his own unilateral action. Supp. Br. 6 (advocating a rule under which an alien's "withdrawal of the voluntary departure request * * * would be effective immediately upon filing"). Petitioner's premise is that this Court must recognize *some* atextual exception to the express statutory and regulatory restrictions on voluntary departure in order to "reconcile" and "give content to both the voluntary departure and motion to reopen provisions." *Id.* at 3, 4. That premise is incorrect.

Like any alien whose arguments for permitting him to remain in the United States have been rejected by the BIA, an alien whose final order provides for voluntary departure in lieu of removal may generally "file one motion to reopen." 8 U.S.C. 1229a(c)(7)(A) (Supp. V 2005). And, like an

alien who has been ordered removed, an alien who has been granted voluntary departure may not obtain adjudication of such a motion if he departs or is removed from the United States. 8 C.F.R. 1003.2(d).[1] The fact that such an alien is subject to certain penalties if he fails to depart within the specified time means that the decision to seek voluntary departure has real consequences. It does not, however, mean that the alien has "forfeit[ed]" the ability to pursue a motion to reopen. Pet. Supp. Br. 5.

Congress has provided that an alien who overstays a period of voluntary departure generally becomes "ineligible, for a period of 10 years, to receive" several specified forms of *discretionary* relief, including cancellation of removal, adjustment of status, and a future grant of voluntary departure. 8 U.S.C. 1229c(d)(1)(B) (Supp. V 2005); see Gov't Br. 6-7 (describing other consequences). But such an alien remains eligible for *other* forms of protection from removal—including asylum,[2] withholding of removal,[3] and protection under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong, 2d Sess. (1988), 1465 U.N.T.S. 85—and he may con-

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[1] That regulation, which petitioner has not challenged (1/7/08 Tr. 9; Gov't Br. 36-37 n.16)—and the parallel regulation providing that an appeal of an immigration judge's decision to the BIA shall be dismissed if the alien leaves the country, 8 C.F.R. 1003.4—have been integral features of the regulations since immediately after the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq*, was passed in 1952. See 17 Fed. Reg. 11,475, 11,476 (1952). Their premise is that because the whole purpose of the administrative proceedings is to effect the alien's removal from the United States, those proceedings (including any appeals or ancillary matters) are properly terminated if the alien departs.

[2] 8 U.S.C. 1158 (2000 & Supp. V 2005).

[3] 8 U.S.C. 1231(b)(3) (2000 & Supp. V 2005).

tinue to pursue such claims through a motion to reopen even if he overstays his voluntary departure period. Under this regime, an alien's failure to comply with the terms of an order granting voluntary departure—itself "a discretionary form of relief," Pet. Supp. Br. 1—renders the alien ineligible to remain in the United States as a matter of grace based on his personal circumstances. In contrast, even an alien who overstays does not lose the ability to seek protection from removal if subsequent developments *outside* the United States have made it unsafe for him to depart.

Thus, under the INA and the Attorney General's current regulations, a request for voluntary departure reflected in the BIA's final order effectively concludes the removal proceedings insofar as possible discretionary relief such as cancellation of removal and adjustment of status are concerned. An alien who wishes to keep open the option of pursuing such relief should not request voluntary departure. While an alien granted voluntary departure by the BIA is not categorically barred from subsequently moving to reopen to seek such relief, the combined effect of the INA, the regulations, and the time it takes to grant reopening may effectively preclude such relief. But there is nothing irrational about requiring an alien to choose between requesting voluntary departure and continuing to pursue such relief after entry of a final order, or about providing that reopening motions may still lead to *other* forms of relief.

The INA does not require the Attorney General to either *automatically* toll the voluntary departure period or *automatically* terminate voluntary departure if the alien requests reopening. And petitioner did not diligently pursue relief on his own behalf: he failed to seek a remand on the basis of supposed changed circumstances while his ap-

peal was pending before the BIA, waited until the end of the departure period to seek reopening and request withdrawal of voluntary departure, failed to request expedited consideration of that motion, and failed to request an extension of the departure period to allow the BIA time to act. Gov't Br. 12.

In short, petitioner is not seeking to "safeguard access to motions to reopen for aliens granted voluntary departure." Supp. Br. 6. Rather, he is seeking to leverage a *procedural* right to file a motion to reopen into an exemption from a *substantive* restriction that Congress has imposed on the Board's ability to grant *certain* (but not all) forms of discretionary relief.

2. Petitioner has failed to identify *any* language in the INA, the Attorney General's current regulations, or the BIA's order in this case that supports his contention that he was entitled to withdraw unilaterally from his voluntary departure agreement. Nor is such a result supported by any precedential decision of the BIA.

Petitioner's reliance on the Board's unpublished, single-member decision in *Davis*, B.I.A. No. A76-832-166 (Mar. 3, 2006) (per curiam), is misplaced. Only three-member or en banc Board decisions serve as precedents for future cases, 8 C.F.R. 1003.1(g), and only if they are designated for publication, *Board of Immigration Appeals Practice Manual* § 1.4(d)(ii), at 10 (July 30, 2004). The BIA resolved 8841 motions to reopen in 2006, 10,995 in 2005, and 10,121 in 2004.[4] A one-paragraph decision that provides neither explanation nor citation for its one-sentence statement that it would not "reinstate" a voluntary departure period that had never been vacated in the first place, and that had, at least

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[4] Executive Office for Immigration Review, U.S. Dep't of Justice, *FY 2006 Statistical Year Book* T2 (2007) <http:www.usdoj.gov/eoir/statspub/fy06syb.pdf>.

according to its terms, already expired by the time the BIA ruled, cannot possibly be said to reflect official Board policy or a widespread practice of granting such requests. 8 C.F.R. 1240.26(f) (providing that an IJ or the BIA "may reinstate voluntary departure in a removal proceeding that has been reopened," but only "if reopening was granted prior to the expiration of the original period of voluntary departure").

Any apparent conflict between the BIA's decisions in *Davis* and this case would warrant, at most, a remand to the agency for further explanation. But given that Davis and petitioner were represented by the same attorney before the BIA and the Fifth Circuit; that, when the BIA's decision in *Davis* was issued, petitioner still had seven days in which to file a motion to reconsider the denial of his motion to reopen, Pet. App. 3; 8 U.S.C. 1229a(c)(6)(B) (Supp. V 2005); and that petitioner failed to mention *Davis* in his brief to the court of appeals or his certiorari petition, petitioner should be deemed to have forfeited any claim to such a remand.

The BIA's decision in *Diaz-Ruacho*, 24 I. & N. Dec. 47 (2006) (see Pet. Supp. Br 10-11), and the regulation upon which it relied, actually undermine petitioner's argument that an alien who has been granted voluntary departure by the Board may unilaterally withdraw from that arrangement on the eve of his departure date.[5] The INA provides that an alien who is granted voluntary departure by an IJ at the conclusion of removal proceedings "shall be required to post a voluntary departure bond." 8 U.S.C. 1229c(b)(3).

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[5] The other regulations petitioner cites (Supp. Br. 10 n.14) involve grants of voluntary departure made before the conclusion of removal proceedings. 8 C.F.R. 240.25(f) (pre-removal proceeding grants by the Department of Homeland Security); 8 C.F.R. 1240.26(b)(3)(ii) (grants by IJs before the conclusion of removal proceedings).

The Attorney General's regulations currently provide that the bond "shall be posted * * * within 5 business days of the immigration judge's order granting voluntary departure," and that, if the bond is not so posted, "the voluntary departure order shall vacate automatically and the alternate order of removal will take effect on the following day." 8 C.F.R. 1240.26(c)(3). In *Diaz-Ruacho*, the BIA concluded that because "[t]he posting of a voluntary departure bond is a statutory *condition precedent* to ensure that an alien departs within the time afforded," an IJ's grant of voluntary departure "remains inchoate until the posting of a bond within 5 days of the order." 24 I. & N. Dec. at 50 (quoting *A-M-*, 23 I. & N. Dec. 737, 744 n.8 (B.I.A. 2005)). As a result, the BIA further concluded that an alien who fails to post the required bond is not subject to the statutory penalties prescribed for aliens who fail to depart within the time specified in a final order granting voluntary departure. *Id.* at 51.[6]

This case differs from *Diaz-Ruacho* in every material respect. Filing a motion to reopen (unlike posting a bond) is not a pre-condition to obtaining voluntary departure, and there is no current regulation that provides that an alien's act of filing a motion to reopen automatically terminates a previous grant of voluntary departure. In addition, because DHS may detain an alien who is granted voluntary departure until he posts a bond, 8 C.F.R. 1240.26(c)(3), and because the requirement to post a bond is *not* suspended by the alien's filing of an appeal to the BIA, see *A-M-*, 23 I. & N. Dec. at 744 n.8, an alien who does not intend to live up to his voluntary departure bargain cannot manipulate the

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[6] The Attorney General's proposed regulations would abrogate *Diaz-Ruacho* and "make clear that the failure to post a voluntary departure bond does not exempt the alien[] from * * * the penalties for failure to depart voluntarily." 72 Fed. Reg. 67,684 (2007).

bond requirement in order to place himself in a better position than an alien who was never granted voluntary departure in the first place.[7]

3. Finally, petitioner suggests (Supp. Br. 6 n.4) that this Court "could also construe the statute such that the filing of a motion to reopen by an alien granted voluntary departure would trigger withdrawal from voluntary departure (thus also reaching aliens who did not request withdrawal expressly)." But nothing in the INA or the current regulations so provides, and aliens who have been granted voluntary departure currently file motions to reopen without any notice of such an automatic termination rule. Cf. 72 Fed. Reg. 67,686 (2007) (proposed 8 C.F.R. 1240.26(b)(3)(iii)) (providing that the IJ "shall advise the alien of" the consequences of filing "a post-decision motion to reopen or reconsider"). For these and other reasons, any alteration of the current voluntary departure regime should be made prospectively only, and only after full consideration by the Attorney General. Gov't Supp. Br. 10.

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[7] Petitioner asserts (Supp. Br. 7) that permitting unilateral withdrawal "would not invite any abuse." This case demonstrates otherwise. If petitioner's unilateral assertion that he wished to withdraw from his agreement to depart voluntarily had the effect of automatically eliminating the grant of voluntary departure contained in the Board's final order, it would mean that petitioner was able to secure a 28-day deferral of the entry of a final order of removal without the *ex ante* or *ex post* assent of the BIA.

* * * * *

For the foregoing reasons and those stated in the respondent's merits and supplemental briefs, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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In The
Supreme Court of the United States

SAMSON TAIWO DADA,

Petitioner,

v.

PETER D. KEISLER,
Acting United States Attorney General,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR *AMICI CURIAE* AMERICAN IMMIGRATION LAW FOUNDATION, AMERICAN IMMIGRATION LAWYERS ASSOCIATION, AND CATHOLIC CHARITIES COMMUNITY SERVICES, ARCHDIOCESE OF NEW YORK IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

The American Immigration Law Foundation (AILF) is a non-profit organization founded in 1987 to increase public understanding of immigration law and policy, to promote public service and professional excellence in the immigration law field, and to advance fundamental fairness, due process, and basic constitutional and human rights in immigration law and administration. The AILF Legal Action Center is a litigation and legal services program whose purpose is to assure the fair and just administration of immigration laws and policies. The Legal Action Center has written and published on its website and elsewhere practice materials addressing voluntary departure, its limitations, and consequences. *See infra* note 8. In addition, AILF appeared as *Amicus Curiae* in *Ugokwe v. U.S. Atty. Gen.*, 453 F.3d 1325 (11th Cir. 2006), and *Chedad v. Gonzales*, 497 F.3d 57 (1st Cir. 2007), as well as several unpublished cases addressing the issue presently before the Court.

The American Immigration Lawyers Association (AILA) is a non-profit association of immigration and nationality lawyers and law school professors. Founded in 1946, AILA is an affiliated organization of the American Bar Association. It now has more than

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici Curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Both parties have consented to the filing of this brief.

11,000 members organized in 36 chapters across the United States, in Canada, and in Europe. AILA members regularly appear before federal courts throughout the United States. AILA's members' clients will be directly affected by the decision of this Court in this matter. In formal liaison meetings, AILA has urged the Executive Office for Immigration Review (EOIR) to adopt a policy of tolling the voluntary departure period upon the filing of a timely motion to reopen.

Catholic Charities Community Services ("Catholic Charities"), Archdiocese of New York, is a not-for-profit voluntary agency serving the Bronx, Manhattan, Staten Island, and the Lower Hudson Valley. It is part of the complex array of organizations that fall under the umbrella of Catholic Charities of the Archdiocese of New York. Catholic Charities provides low-cost and free counseling and legal representation to documented and undocumented immigrants. The office conducts direct representation in administrative interviews, hearings, and court proceedings, and its lawyers regularly appear before local United States District Courts and the Court of Appeals for the Second Circuit. Catholic Charities' clients will be directly affected by the decision of this Court in this matter.

SUMMARY OF ARGUMENT

Amici Curiae proffer this brief in support of Petitioner Dada and to assist the Court by illuminating the realities of voluntary departure. Those courts of appeals that would not toll the voluntary departure period to allow for a motion to reopen have presumed that voluntary departure is an arm's-length transaction between the government and the recipient. Their assumption reflects a misunderstanding of the actual benefits of voluntary departure and the "application" process itself. Specifically, the courts did not consider voluntary departure's limited and often illusory benefits or the lack of adequate notice to the recipient about its adverse consequences. Nor did these courts realize that tolling the voluntary departure period actually benefits the government and effectuates public policy goals.

First, the perceived primary benefit of voluntary departure – exemption from the inadmissibility bar for having been ordered removed – is not necessarily a benefit; many voluntary departure recipients are otherwise inadmissible to the United States despite the grant of voluntary departure. *See infra* Part I.A.1. Not only are the benefits illusory, but also many recipients of voluntary departure orders find themselves in the same or even worse situation than people ordered removed. *See infra* Part I.A.2.

Second, the statute and the regulations fail to ensure that individuals actually understand the requirements and consequences of voluntary departure.

See infra Part I.B. As a result, the notion that individuals knowingly agree to the terms of voluntary departure often is a fallacy.

Finally, tolling the voluntary departure period when a motion to reopen is filed does not adversely affect the government but rather provides real benefits. *See infra* Part II. Because motions to reopen must include completed applications and fees, and satisfy other requirements, and because the Board of Immigration Appeals (BIA) and immigration judges now adjudicate motions to reopen quickly, people have little cause to file motions to reopen for the sole purpose of delay. *See infra* Part II.A. Furthermore, allowing the adjudication of a meritorious motion to reopen is consistent with public policy, as expressed by Congress, the courts, and the Department of Justice. *See infra* Part II.B. The Court's analysis should be informed by all of these factors.

ARGUMENT

I. Voluntary Departure Is Not Necessarily an Agreed-Upon Exchange of Benefits.

Undergirding the issue before the Court is the assumption that voluntary departure is an "agreed-upon exchange of benefits" between an applicant and the government. *See* Respondent's Br. in Opp'n 8 (quoting *Banda-Ortiz v. Gonzales*, 445 F.3d 387, 389-90 (5th Cir. 2006)); *Matter of Zmijewska*, 24 I&N Dec.

87, 92 (BIA 2007) (citing *Banda-Ortiz*, 445 F.3d at 389) (suggesting that "voluntary departure involves a quid pro quo arrangement between an alien and the Government of the United States"). In exchange for departing within a specified period of time at his or her own expense – a considerable benefit to the government – a person granted voluntary departure avoids being ordered removed. *See* 8 U.S.C. § 1229c(a)(1), (b)(1) (2007). Nonetheless, the reality is that in many cases, a person neither benefits from voluntary departure nor does he or she know and understand the terms, risks, and consequences of this alleged "benefit."

A. Voluntary Departure Does Not Necessarily Benefit the Noncitizen.

1. The Benefits Are Illusory

The benefit to the government is tangible and clear: voluntary departure expedites a person's departure from the United States and eliminates the expense of removing the person to a foreign country. *See, e.g., Chedad v. Gonzales*, 497 F.3d 57, 61 (1st Cir. 2007); *Thapa v. Gonzales*, 460 F.3d 323, 328 (2d Cir. 2006). In contrast, in many cases, the "benefit" to the person "granted" voluntary departure is illusory. The result is a lopsided arrangement whereby conditions are imposed and the individual incurs serious adverse consequences, often without the person's advanced awareness or consent.

The primary anticipated benefit for the individual from voluntary departure is exemption from the legal consequences of a removal order. *See Chedad*, 497 F.3d at 61, 63 n.8 (calling the ability to re-enter "one of the main attractions of voluntary departure"); *Ngarurih v. Ashcroft*, 371 F.3d 182, 194 (4th Cir. 2004) (describing the "specific benefit" of voluntary departure as "exemption from the ordinary bars to subsequent relief"); *Contreras-Aragon v. INS*, 852 F.2d 1088, 1090 (9th Cir. 1988) (en banc) ("most importantly, the grant of voluntary departure facilitates the possibility of return to the United States"); *see also Matter of Zmijewska*, 24 I&N Dec. at 92 (citing 8 U.S.C. § 1182(a)(9)(A)(ii) as an adverse consequence of a removal order). A person who is ordered removed is inadmissible to the United States for either five or ten years, depending on the manner of entry to the United States.[2] 8 U.S.C. § 1182(a)(9)(A)(i), (ii). Thus, voluntary departure "facilitates the possibility of return to the United States. . . ."[3] *Lopez-Chavez v. Ashcroft*, 383 F.3d 650, 651 (7th Cir. 2004) (cited in *Banda-Ortiz*, 445 F.3d at 390); *see also*

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[2] "Arriving aliens" generally are subject to a five-year bar, 8 U.S.C. § 1182(a)(9)(A)(i), whereas "other aliens," including individuals who initially entered with a visa or who entered without being admitted or paroled, generally are inadmissible for ten years from the date of admission. 8 U.S.C. § 1182(a)(9)(A)(ii).

[3] When a person is outside the United States, he or she may process his or her case at a United States Embassy abroad (consular process) in order to enter as a lawful permanent resident. *See generally* 8 U.S.C. §§ 1201-1202.

Contreras-Aragon, 852 F.2d at 1090 (noting that a person who leaves under a voluntary departure order may "return immediately").

However, in many, perhaps most, cases an exemption from the five- or ten-year bar in 8 U.S.C. § 1182(a)(9)(A) is meaningless because the individual otherwise is subject to a ten-year bar to admission to the United States pursuant to 8 U.S.C. § 1182(a)(9)(B)(i)(II). Section 1182(a)(9)(B)(i)(II) provides that individuals who are unlawfully present in the United States for more than one year are inadmissible for ten years.[4] "Unlawful presence" is accrued when a person remains in the United States past an authorized period of stay or when a person is present in the United States without being admitted or paroled. 8 U.S.C. § 1182(a)(9)(B)(ii).

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[4] Congress added the unlawful presence ground of inadmissibility to the Immigration and Nationality Act (INA) through the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 301, 110 Stat. 3009 (1996) (IIRIRA). Thus, prior to the enactment of IIRIRA, it was far more likely that a person would be able to return lawfully and quickly to the United States after departing voluntarily.

Although there is a statutory waiver of the unlawful presence bar, the waiver is available only to a narrow class of individuals who can show that the refusal to admit them will result in "extreme hardship" to a United States citizen or lawful permanent resident spouse, son or daughter. 8 U.S.C. § 1182(a)(9)(B)(v). The Attorney General has sole, unreviewable discretion to grant this waiver. *Id.*

Not surprisingly, many people who are eligible for voluntary departure have accrued more than one year of unlawful presence in the United States.[5] In fact, from what appears in the court record of six of the seven published circuit court cases addressing the question presently before this Court, each of those petitioners accrued more than one year of unlawful presence and would be subject to the inadmissibility bar described in 8 U.S.C. § 1182(a)(9)(B)(i)(II).[6] Petitioner Dada himself also may have accrued more than one year of unlawful presence. *See* App. to Pet. for

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[5] Voluntary departure is not available to everyone in removal proceedings. For example, persons who have been convicted of aggravated felonies – a widely encompassing category of offenses, 8 U.S.C. § 1101(a)(43) – are statutorily barred from voluntary departure. 8 U.S.C. § 1229c(a)(1), (b)(1)(C). Importantly, to be eligible for voluntary departure at the conclusion of removal proceedings, a person must have been physically present in the United States for one year prior to the service of the Notice to Appear. 8 U.S.C. § 1229c(b)(1)(A). Given this requirement, it is likely that many individuals eligible for voluntary departure at the conclusion of proceedings will have accrued more than one year of unlawful presence.

[6] *Banda-Ortiz*, 445 F.3d at 388 (entered without inspection eleven years prior to initiation of removal proceedings); *Chedad*, 497 F.3d at 59 (overstayed visitor visa by more than one year); *Azarte v. Ashcroft*, 394 F.3d 1278, 1280 (9th Cir. 2005) (entered without inspection more than nine years prior to initiation of removal proceedings); *Dekoladenu v. Gonzales*, 459 F.3d 500, 502 (4th Cir. 2006) (overstayed visitor visa by more than one year before applying for asylum); *Ugokwe v. U.S. Atty. Gen.*, 453 F.3d 1325, 1326 (11th Cir. 2006) (overstayed visitor visa by more than one year); Brief of Petitioner at 5, *Sidikhouya v. Gonzales*, 407 F.3d 950 (8th Cir. 2005) (No. 04-1365) (overstayed visitor visa by more than one year).

Cert. 8 (describing how Mr. Dada overstayed his nonimmigrant visa for more than one year before his wife filed an immigrant petition on his behalf). Therefore, even if Mr. Dada were to depart within the voluntary departure period, he would be subject to a ten-year bar to reentering the United States.

Thus, the presumed primary benefit of voluntary departure – relief from the future legal consequences of a removal order – very often is not a benefit at all. Although the government cites additional benefits to the applicant, namely the ability to make arrangements without the threat of custody, to select the destination of departure, and to avoid the stigma associated with forced removal,[7] these benefits also often are illusory. Many individuals under voluntary departure orders are detained throughout the departure period.[8] Therefore, there is no reason to believe

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[7] Respondent's Br. in Opp'n 9. *See also Lopez-Chavez*, 383 F.3d at 651 (stating that voluntary departure allows people "to put their affairs in order without fear of being taken into custody at any time"); *Banda-Ortiz*, 445 F.3d at 390 (same).

[8] *Amicus Curiae* AILA has raised the issue of detention following the grant of voluntary departure in liaison meetings with the Department of Homeland Security (DHS). *See* App. 2 (discussing DHS' cooperating with detained individuals ordered to depart voluntarily to ensure that detention does not prevent them from timely departing through no fault of their own); App. 3-4 (raising concerns about individuals taken into custody when voluntary departure was the sole form of relief requested); *see also* Andrea Acosta, *ICE Detention Exceeds Legal Limit: Mother Pleads for Her Son's Release*, New American Media, May 24, 2007, *available at* http:/news.newamericamedia.org/news/view_article.html?article_id=031cdb0caac2578f22e5fa31061a8d87 (detailing DHS'

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that accepting voluntary departure means avoiding the fear of being taken into custody or having the opportunity to put one's affairs in order prior to leaving the United States. Likewise, the statement that voluntary departure allows a person to "select" the destination of departure is misleading; a person's destination options are limited to countries that will allow him or her to enter.

2. The Consequences of Failing to Voluntarily Depart Can Be More Severe than the Consequences of Removal

In addition to the illusory benefits of voluntary departure, noncitizens ordered removed often have more and better options to regularize their status and

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detention of a person granted voluntary departure) (last visited Nov. 4, 2007).

In addition, in June 2003, Glen A. Fine, Inspector General of the Department of Justice, testified before Congress that following September 11, 2001, the former Immigration and Naturalization Service (INS) detained hundreds of noncitizens, including those with voluntary departure orders, and did not permit them to leave the United States. *See The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* (statement of Glen A. Fine, Inspector General, Dept. of Justice before the Sen. Comm. on the Judiciary) (June 25, 2003), *available at* http://www.usdoj.gov/oig/testimony/0306.htm.

suffer fewer penalties than those "granted" voluntary departure.[9]

Specifically, the INA provides penalties for failure to depart within the time specified for voluntary departure. 8 U.S.C. § 1229c(d). Those penalties include ineligibility for ten years for adjustment of status, cancellation of removal, voluntary departure, and other relief from removal. *Id.* The INA does not provide any such penalties for a person who was ordered deported but did not leave the United States.[10] Consequently, noncitizens who were ordered removed, but who did not leave the United States, remain eligible for relief and may seek reopening. 8 U.S.C. § 1229a(c)(7).

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[9] *Amicus Curiae* AILF has long warned immigration attorneys about the consequences of voluntary departure, particularly in comparison to the consequences of a removal order. *See* AILF Practice Advisory, *Failure to Depart After a Grant of Voluntary Departure: The Consequences and Arguments to Avoid Them* (February 21, 2006), *available at* http://www.ailf.org/lac/lac_pa_022106.pdf (superseding earlier versions of the practice advisory). AILF Practice Advisories are intended for use by attorneys, and an explanation of this intent is provided on AILF's website. *See* AILF Legal Action Center Practice Advisory Home Page, *available at* http://www.ailf.org/lac/lac_pa_index.shtml (stating that "AILF's Practice Advisories are intended to assist immigration lawyers" and "do not substitute for individual legal advice supplied by a lawyer familiar with a client's case").

[10] The legal consequence of having been ordered deported, i.e., inadmissibility to the United States for five or ten years, is not triggered until the person leaves the United States. 8 U.S.C. § 1182(a)(9)(A).

Significantly, even if the person remains in the United States for months or even years after the entry of a removal order, the government can and sometimes does agree to the motion to reopen, even though the motion is long out of time.[11] 8 C.F.R. §§ 1003.2(c)(3)(iii) and 1003.23(b)(4)(iv).[12] The BIA and immigration judges also have authority to *sua sponte* reopen a case at any time. 8 C.F.R. §§ 1003.2(a) and 1003.23(b)(1). Of course, the government will not stipulate to reopen and the immigration judge or BIA will not reopen *sua sponte* if the person is statutorily ineligible for the underlying relief because of a voluntary departure overstay, even if he or she is otherwise eligible and deserving.[13]

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[11] This process has the effect of exempting the motion to reopen from the 90-day filing period in 8 U.S.C. § 1229a(c)(7)(C)(i).

[12] *See also* Memorandum on Prosecutorial Discretion from William J. Howard, U.S. Immigration and Customs Enforcement Principal Legal Advisor, to all Office of Principal Legal Advisor Chief Counsel 7 (Oct. 24, 2005) ("Howard Memo"), *available at* http://www.aila.org/content/fileviewer.aspx?docid=19310&linkid=145122 (directing DHS attorneys to "strongly consider exercising prosecutorial discretion and join" an untimely motion).

[13] *See* Howard Memo 7 (DHS will join the motion only if the movant is "legally eligible to be granted that relief except that the motion is beyond the 90-day limitation"); Memorandum on Motions to Reopen for Consideration of Adjustment of Status from Bo Cooper, General Counsel for Immigration and Naturalization Service, to Regional Counsel 2 (May 17, 2001), ("Cooper Memo"), *available at* http://www.aila.org/Content/default.aspx?docid=16962 (specifying that former INS would not join a motion to reopen if the person is ineligible for relief because he or she overstayed the voluntary departure period).

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This dichotomy between the consequences of a voluntary departure order and the consequences of a removal order is well illustrated in the recent BIA decision, *Matter of Diaz-Ruacho*, 24 I&N Dec. 47 (BIA 2006). In *Matter of Diaz-Ruacho*, the BIA initially denied Mr. Diaz-Ruacho's motion to reopen, finding that he was ineligible for cancellation of removal because he had failed to depart under the voluntary departure order. *Id.* at 48. After Mr. Diaz-Ruacho filed a petition for review, the BIA vacated its earlier order, reconsidered, and concluded that his voluntary departure order was not valid. As there was no voluntary departure order, the BIA found that Mr. Diaz-Ruacho was not barred from applying for cancellation of removal and reopened his case. *Id.* at 51.

Even if a noncitizen ordered deported is physically removed from the United States, thereby effectuating the removal order, he or she may be in a better situation than a person who accepted voluntary departure but overstayed to await a decision on his or her motion to reopen. Specifically, a person who departed under an order of removal or while a removal order was outstanding will be inadmissible for

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Significantly, the former INS stated that one of the factors for deciding whether to join in an untimely motion to reopen is "the hardship to the alien and/or her [United States citizen] or [lawful permanent resident] family members if the alien were required to procure a visa through consular processing (including the potential applicability of section 212(a)(9) [8 U.S.C. § 1182(a)(9)] should the alien depart the United States[.])." Cooper Memo at 2-3.

five or ten years, respectively. 8 U.S.C. § 1182(a)(9)(A)(i), (ii). That person, however, is eligible to request permission to reapply for admission earlier than five or ten years. 8 U.S.C. § 1182(a)(9)(A)(iii). This means such a person could re-enter the United States as a lawful permanent resident after consular processing, based on a petition filed either by a United States relative or an employer, long before the expiration of the five- or ten-year inadmissibility bar under 8 U.S.C. §1182(a)(9)(A).

By contrast, if the running of the voluntary departure period is not tolled to allow a decision on a properly-filed, timely motion to reopen, a person who stayed in the United States to allow the BIA or immigration judge to make that decision is ineligible to become a lawful permanent resident (through adjustment of status) for ten years. There is no "waiver" or "permission to reapply" earlier.

B. The INA and Applicable Regulations Do Not Ensure That Noncitizens Knowingly Assume the Risks and Consequences of a Voluntary Departure Order.

The INA and regulations do not ensure that noncitizens are informed ahead of time of the limitations of voluntary departure and most importantly, the serious risks. Lower courts' decisions are premised on the assumption that the noncitizen knowingly accepted these risks. *See Banda-Ortiz*, 445 F.3d at

389-90 (noting that a voluntary departure applicant must agree to the terms); *Dekoladenu*, 459 F.3d at 506 (calling voluntary departure a "deal" in which applicant must give up certain rights). The reality often is entirely otherwise.

A large majority of people who appear before immigration judges are unrepresented. For example, in FY 2006, 65% of the total number of individuals who appeared in immigration court, or 210,705 of 323,845, did not have representation.[14] In these *pro se* cases, the noncitizen's knowledge of immigration law and removal proceedings may be limited to what the immigration judge is required to tell him or her.

The INA does not obligate the immigration judge to explain or ensure the noncitizen understands the risks of accepting voluntary departure. The voluntary departure statute requires only that "[t]he *order* permitting an alien to depart voluntarily shall inform the alien of the penalties under this subsection." 8 U.S.C. § 1229c(d)(3) (emphasis added). There is no requirement that the immigration judge provide notice of these consequences before issuing the order. This means that even a literate, English-speaking person in removal proceedings would have no way to know the risks and consequences of failing to timely

[14] *See* U.S. Department of Justice, Executive Office for Immigration Review *FY 2006 Statistical, Year Book* G1 (Feb. 2007), *available at* http://www.usdoj.gov/eoir/statspub/fy06syb.pdf.

depart until *after* he or she receives and reviews the court's written order.

Further, the written notice fails to provide a meaningful explanation of the consequences. Although the notice does say that remaining in the United States beyond the authorized period will result in the person being ineligible for several forms of relief, it lists the forms of relief using only the statutory terminology, such as "adjustment of status" and "change of status."[15] This notice does not explain,

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[15] The form notice says the following:

> You have been granted voluntary departure from the United States pursuant to section 240B of the Immigration and Nationality Act, and remaining in the United States beyond the authorized date will result in your being found ineligible for certain forms of relief under the Immigration and Nationality Act (see Section A Below) for ten (10) years from the date of the scheduled departure. Your voluntary departure bond, if any, will also be breached. Additionally, if you fail to voluntarily depart the United States within the time period specified, you shall be subject to a civil penalty of not less than $1000 and not more than $5000.
>
> * * *
>
> A. THE FORMS OF RELIEF FROM REMOVAL FOR WHICH YOU WILL BECOME INELIGIBLE ARE:
>
> 1. Voluntary departure as provided for in section 240B of the Immigration and Nationality Act;
> 2. Cancellation of removal as provided for in section 240A of the Immigration and Nationality Act;
>
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in language that the person will understand, that ineligibility for "adjustment of status . . . in Section 245" means that the person will not be able to apply for legal status (permanent residence or a "green-card") based on an application filed by his or her United States citizen spouse. The real life consequences of voluntary departure are masked in legal terminology.

Moreover, the immigration judge's decision and order, with the written notice of the consequences of failing to depart timely, may be mailed to the individual after the hearing. *See* 8 C.F.R. § 1003.37.[16] In those situations, there may be no one to explain the

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3. Adjustment of status or change of status as provided for in Section 245, 248 or 249 of the Immigration and Nationality Act.

U.S. Dep't of Justice, Executive Office for Immigration Review, Immigration Judge Benchbook, Part. II, J-30 (2001) *available at* http://www.usdoj.gov/eoir/statspub/benchbook.pdf. *See also* C.A. App. 1 (Petitioner Dada's notice).

[16] 8 C.F.R. § 1003.37(a) provides:

> A decision of the Immigration Judge may be rendered orally or in writing. If the decision is oral, it shall be stated by the Immigration Judge in the presence of the parties and a memorandum summarizing the oral decision shall be served on the parties. If the decision is in writing, it shall be served on the parties by first class mail to the most recent address contained in the Record of Proceeding or by personal service.

See also 8 C.F.R. §§ 1240.12(a) ("The decision of the immigration judge may be oral or written . . . ") and 1240.13(a) ("A written decision shall be served upon the respondent and the Service counsel . . . Service by mail is complete upon mailing.").

legal terminology, and no real way for the individual to understand what has happened or the consequences.[17]

The "application" process itself also fails to provide the applicant with any warning of the gravity of the decision to enter into a voluntary departure agreement. There is no form to apply for voluntary departure, as there are for other immigration applications. *See* 8 C.F.R. § 299.1 (listing forms for various applications including adjustment of status (I-485), asylum (I-589), and employment authorization (I-765)). Applicants must complete and sign these applications. *See* 8 C.F.R. § 1245.2 (requiring submission of adjustment application); 8 C.F.R. § 1208.3 (requiring submission of asylum application); 8 C.F.R. § 1240.20 (requiring submission of cancellation of removal application). The applications provide instructions that state the purpose of the application, describe the eligibility requirements, and when applicable, inform the applicant of penalties associated with seeking this relief.[18]

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[17] As revealed in Petitioner Dada's own case, even if the person later learns of the consequences, there is no procedure for "giving back" a voluntary departure order. Mr. Dada's motion to the BIA requested, among other things, to withdraw his voluntary departure order. Pet. App. 3. The BIA noted this request but did not otherwise address or resolve it. Pet. App. 3.

[18] *See, e.g.*, Form I-589, *available at* http://www.uscis.gov/files/form/I-589.pdf (describing the consequences for an applicant who submits a frivolous asylum application); Form I-485 Instructions at 9, *available at* http://www.uscis.gov/files/form/

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The voluntary departure "application process" is quite different. Noncitizens do not review, complete, or sign any application. The statute and regulations do not require them to affirm – either in writing or otherwise – that they understand the benefit of voluntary departure or have been informed of the conditions and consequences. The immigration judge is required only to determine whether they are eligible for voluntary departure before entering the order. 8 U.S.C. § 1229c(a)(1), (b)(1); 8 C.F.R. § 1240.26(b), (c).

Under this process, potential voluntary departure recipients have no way to know whether agreeing to accept this so-called "benefit" truly is beneficial. Making an informed decision necessarily would take into account, solely on the "benefit" side: whether they have accrued more than one year of unlawful presence that would bar them from admission to the United States even if they leave under a voluntary departure order; whether they are detained and likely to remain detained during the removal and/or voluntary departure period; whether imminent removal is likely; and whether they have options regarding the departure destination. On the "consequences" side, an informed decision necessarily would review and encompass all the adverse consequences for failure to timely depart.

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i-485instr.pdf (describing penalties for traveling outside the United States while the application is pending and for providing false information on the applications).

Because people ordered to depart voluntarily often are unrepresented and may not be informed of the consequences of failing to depart, either by an immigration judge or by written notice or an application form prior to imposition of the order, the person may be entirely unaware of the penalties. The lack of assurances that the recipient understands the risks and consequences of voluntary departure, combined with the illusory benefits, means that voluntary departure is not necessarily an arm's-length transaction, as presumed by courts and argued by Respondent.

II. The Government's Concern That Tolling Adversely Affects the Government Is Misguided.

A. Short Adjudication Timeframes Discourage Filing Solely for Delay.

Tolling does not deprive the government of the benefits of voluntary departure. *See* Respondent's Br. in Opp'n 12 (arguing that tolling the voluntary departure period would "substantially deny" benefits to the government). As discussed *infra*, immigration judges and the BIA adjudicate most motions to reopen in fewer than 60 or 90 days, respectively. These short adjudication timeframes and several other realities mean that tolling of the voluntary departure period does not effectively encourage frivolous motions to reopen or result in additional costs to the government.

In the past, filing a motion to reopen could result in a long delay, as the immigration courts and the BIA[19] often took months or even years to adjudicate cases. According to the BIA, by 2002 it was unable to "effectively and efficiently" adjudicate the cases before it, and as a result, a sizeable backlog developed. *See* Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54878, 54878-79 (Aug. 26, 2002). EOIR, the administrative agency responsible for the immigration courts and the BIA, said that the backlog and lengthy delays "encouraged abuse of the system" because filing an appeal at the BIA would prolong the entry of a final decision. *See* U.S. Department of Justice, Executive Office for Immigration Review, Fact Sheet: BIA Restructuring and Streamlining Procedures (March 9, 2006) ("BIA Fact Sheet"), *available at* http://www.usdoj.gov/eoir/press/06/BIAStreamliningFactSheet030906.htm.

To address this problem, in 2002 the BIA adopted "procedural reforms," which, *inter alia*, instituted adjudication deadlines. *See* 67 Fed. Reg. at 54896,

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[19] The motion to reopen must be filed at the adjudicatory body that last had jurisdiction over the case. BIA Practice Manual, § 5.2(a), App. K-1, *available at* http://www.usdoj.gov/eoir/vll/qapracmanual/apptmtn4.htm. For example, in Petitioner Dada's case, the BIA had denied his appeal of the original removal order. Thus the BIA last had jurisdiction over the case, and he properly filed his motion there. App. to Pet. for Cert. 3. A person who did not appeal the underlying removal order would file the motion with the immigration judge.

54903-04.[20] One of the newly implemented BIA reforms was a 90-day deadline for adjudicating the majority of cases.[21] 8 C.F.R. § 1003.1(e)(8)(i).

EOIR also implemented Case Completion Goals to expedite the adjudication of cases pending before the immigration courts.[22] Under the Case Completion Goals, immigration judges must try to adjudicate motions to reopen within 60 days.[23]

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[20] The adjudication timeframes originally were codified at 8 C.F.R. § 3.1(e)(8) (2003). This provision was later designated as 8 C.F.R. § 1003.1(e)(8). 68 Fed. Reg. 9824, 9830 (Feb. 28, 2003).

[21] The BIA's regulations require the "prompt" entry of summary dismissals and other miscellaneous dispositions. 8 C.F.R. § 1003.1(e)(8). Cases assigned to a single BIA member must be completed within 90 days. 8 C.F.R. § 1003.1(e)(8)(i). Cases assigned to a three-member panel must be adjudicated in 180 days, *id.*, but three-member panel decisions are reserved only for "complex cases" that "deserve closer attention." 67 Fed. Reg. at 54880. The BIA allows exceptions in "exigent circumstances" or for resolution of an impending precedent decision or regulation. 8 C.F.R. § 1003.1(e)(8)(ii), (iii).

[22] *See* Memorandum on Case Completion Goals from Department of Justice, Executive Office for Immigration Review, Office of the Chief Immigration Judge to all Immigration Judges and Court Administrators (April 26, 2002), *available at* http://www.aila.org/content/default.aspx?bc=8735|17026|9002.

[23] *Supra* note 21. At a March 22, 2006 liaison meeting between EOIR and AILA, EOIR confirmed that immigration judges continue to abide by the Case Completion Goals and that the goal for adjudicating motions to reopen is 60 days. EOIR/AILA Liaison Meeting 14-15 (March 22, 2006), *available at* http://www.usdoj.gov/eoir/statspub/eoiraila032206.pdf. EOIR also explained that immigration judges must receive waivers from their Assistant Chief Immigration Judge (ACIJ) if they

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In 2006, EOIR announced it had eliminated its backlog and reduced delays at the BIA. *See* BIA Fact Sheet. In petitioner Dada's case, for example, the BIA decided his motion to reopen in 69 days. *See* C.A. App. 21 (motion filed Dec. 1, 2005); App. to Pet. for Cert. 3 (BIA decision dated February 8, 2006).

EOIR's success in reducing adjudication times has had the corollary effect of minimizing the incentive for an individual to file a motion to reopen to delay departure. Additional strong disincentives are the required filing fee of $110 for the motion itself and the mandatory, stringent filing and content requirements for such motions.[24]

B. Public Policy Concerns Favor Tolling.

The government expresses concern that tolling while the BIA or immigration judge decides a motion

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cannot meet the goal. *Id.* ACIJs have "discretion" whether to grant waiver requests. *Id.*

[24] Motions to reopen must state new facts that will be proven at a hearing to be held if the motion is granted, and must be supported by affidavits and other evidentiary material. 8 U.S.C. § 1229a(c)(7)(B). A motion to reopen to apply for relief, such as adjustment of status or cancellation of removal, must be accompanied by the appropriate application and all supporting documentation. 8 C.F.R. §§ 1003.2(c)(1) and 1003.23(b)(3). The motion must be in English and all supporting documents must be translated and accompanied by a certificate of translation if they are not in English. 8 C.F.R. §§ 1003.2(g)(1) and 1003.23(b)(1)(i). The $110 filing fee is just for the motion itself. 8 C.F.R. § 1003.24(b)(1); 8 C.F.R. § 1103.7(b)(2). If the motion is granted, the person must pay the additional fee for any underlying application for relief. 8 C.F.R. § 1003.24(c)(2).

to reopen deprives it of the benefit of voluntary departure.[25] In fact, the opposite is true. If the immigration judge or BIA denies the motion or, ultimately, the underlying relief requested, but the person is permitted to depart voluntarily, the government avoids all removal expenses. Alternatively, if the immigration judge or BIA grants the motion, reopens the case, and ultimately grants relief from removal, such as adjustment of status or cancellation, the person is no longer removable and again the government has saved all removal expenses.

The government's position also ignores the public policy endorsed by the BIA and many circuit courts: allowing adjudication of meritorious claims when the applicant has United States citizen or lawful permanent resident immediate family members. The BIA adheres to the policy of allowing motions to reopen filed for adjustment of status based on a marriage to a United States citizen or a lawful permanent resident even if the visa petition still is pending. *Matter of Velarde*, 23 I&N Dec. 253, 257 (BIA 2002). In *Sidikhouya* and *Ugokwe*, both petitioners were seeking to reopen their cases in order to remain with their United States citizen spouses who could file petitions on their behalf. *Sidikhouya v. Gonzales*, 407 F.3d 950, 951 (8th Cir. 2005); *Ugokwe v. U.S. Atty. Gen.*, 453 F.3d 1325, 1327 (11th Cir. 2006). Likewise, in *Azarte*, the petitioners sought to reopen their case in order to remain

[25] Respondent's Br. in Opp'n 12 (citing *Dekoladenu*, 459 F.3d at 506).

lawfully in the United States with their United States citizen children. *See Azarte v. Ashcroft*, 394 F.3d 1278, 1280-81 (9th Cir. 2005) (applying for cancellation of removal because of the hardship to their two United States citizen children).

These cases effectuate the public policy favoring preservation of these families.[26] Approximately one third of all "unauthorized" families in the United States are "mixed status," meaning that at least one parent is unauthorized and at least one child is a United States citizen. Jeffrey S. Passel, *The Size and*

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[26] This Court has emphasized Congress's commitment to family unity. *See Fiallo v. Bell*, 430 U.S. 787, 795 n.6, 806 (1977) (describing how legislators' creation of preference immigration status categories for certain family members showed a commitment to "the problem of keeping families of United States citizens and immigrants united," citing H.R. Rep. No. 1199, 85th Cong., 1st Sess., 7 (1957), and reflected "the underlying intention of our immigration laws regarding the preservation of the family unit," citing H.R. Rep. No. 1365, 82d Cong., 2d Sess., 29 (1952)). *See also* H.R. Rep. No. 107-127 (2001) (statement of Rep. Issa) (stating that the intention of the Family Sponsor Immigration Act of 2001 was "to keep families together"). Congress has made this commitment explicit in the INA. *See* 8 U.S.C. § 1159(c) (providing that the Secretary of Homeland Security or the Attorney General may waive grounds of visa ineligibility for persons seeking adjustment of status as refugees " . . . to assure family unity, or when it is otherwise in the public interest"). Scholars also have recognized the importance of family unity as a policy underlying immigration law. *See, e.g.*, Stephen H. Legomsky, Immigration and Refugee Law and Policy 131 (2d ed. 1997) (stating that the 1952 Act established the first comprehensive set of family-based preferences and since then, "one central value that our immigration laws have long promoted . . . is family unity").

Characteristics of the Unauthorized Migrant Population in the U.S.: Estimates Based on the March 2005 Current Population Survey, Washington, D.C.: Pew Hispanic Center, March 7, 2006, at 8, *available at* http://pewhispanic.org/files/reports/61.pdf. Of those, there are 1.5 million "mixed" families where all the children are United States citizens. *Id.* Tolling the voluntary departure period preserves the avenue for deserving people to remain in the United States lawfully and to support their United States citizen family members.

CONCLUSION

For the foregoing reasons and those set forth in Petitioner's brief, this Court should reverse the judgment of the Fifth Circuit.

Respectfully submitted,

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November 2007

Minutes of AILA N.E. Chapter Liaison Meeting with ICE, CBP & CIS, January 24, 2007 (Excerpt)

Present for Immigration & Customs Enforcement: Bruce Chadbourne, Field Office Director, Detention & Removal; Jim Martin, Deputy Field Office Director, Detention & Removal; Sal Briseno, Assistant Special Agent in Charge, Investigations; Greg Nevano, Group Supervisor, Investigations; Jim Nagel, Acting Assistant Special Agent in Charge, Investigations; Fred McGrath, Chief Counsel; Frank Crowley, U.S. Attorney's Office; Paula Grenier, Public Affairs Officer

Present for Customs & Border Protection: Nancy Gilcoine, Assistant Director, Border Security, Boston Field Office

Present for Citizenship & Immigration Services: Denis Riordan, District Director; Karen Ann Haydon, Assistant District Director; Henry Hanley, General Counsel

Present for AILA: Estelle Regolsky, Howard Silverman, Kerry Doyle, Laura Murray, Tjan, AILA/ICE liaisons; Brian T. O'Neal, AILA/CBP liaison; Robin O'Donoghue, CIS liaison & vice Chair, N.E. Chapter; Bennett Savitz, Chair-Elect, N.E. Chapter; Daniel Harrington, Secretary, N.E. Chapter

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Immigration & Customs Enforcement (ICE)

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25. DRO: How do you handle Voluntary Departure under safeguards? Assuming the person gives you his/her passport, is there anything else they have to do to cooperate? Are there special deportation officers to handle this? What do they do to ensure that the Voluntary Departure happens within the proper time frame? If the foreign national was not granted the statutory maximum of days for VD, will you extend the Voluntary Departure?

If it's voluntary departure and a passport is available, we don't have to do any notification to the country unless there's a treaty requiring that we notify them that someone's in custody. There is no particular officer – we use an assignment wheel. If the departure doesn't happen in the time frame and it's our fault we extend the time frame.

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ICE Liaison Minutes (11/12/03)
Cite as "AILA InfoNet Doc. No. 03120243
(posted Dec. 2, 2003)"
AILA/BICE COMMITTEE MEETING (Excerpt)

Draft Responses of 2:00pm, meeting held in Washington, D.C.

At ICE Headquarters on November 12, 2003

Attendees:

ICE – Victor Cerda, Chief of Staff/ICE and Principal Legal Advisor, Barry O'Mellin, Acting Deputy ICE Counsel, Mike Neifach, Principal Legal Advisor's Chief of Staff/ICE

AILA – Palma Yanni, Denyse Sabagh, Kathleen Walker, Chuck Kuck, David Leopold, Gerry Rovner, Estelle Regolsky, Linda Kenepaske, Patricia Mattos, Jeanne Butterfield, Crystal Williams, Judy Golub

ICE STRUCTURE

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A discussion ensued about the administrative delays being experiences [sic] when all parties agree to removal. Examples were given by the committee of three to four week delays or longer. Mr. Cerda indicated that they certainly did not support such delays and would try to look into the matter. He requested the Committee to provide A numbers of case examples. The committee will be soliciting such examples to be forwarded to Mr. Cerda and his deputy for potential action. Examples were also given as to the Hartford

project wherein the IJ had granted Voluntary Departure as the sole form of relief requested and the individual was then taken into custody.

Mr. Cerda did indicate that numerous detention options were being considered, even some type of parole arrangement in non-mandatory detention cases.

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